Supreme Court, U.S.
FILED
JUL 1 - 2005
OFFICE OF THE CLERK

No. 05- 39

IN THE
Supreme Court of the United States

GENERAL MOTORS CORPORATION,

Petitioner,

v.

DELMAS FORD, SHIRLEY CARTWRIGHT, BERT CROSSLAND, MARGARET CROSSLAND, Individually And on Behalf of All Others Similarly Situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Oklahoma Court violated the due process and commerce clauses of the United States Constitution by holding, in order to facilitate certification of a nationwide class action, that one state's law could be applied to the breach of warranty claims of class members residing in all 50 states.

2. Whether the Oklahoma Court violated the due process clause of the United States Constitution by holding that the class notice that would be sent to class members in all 50 states, and which would allow class members to opt out or remain in the litigation, did not need to disclose what state's law would be applied to the claims asserted in the class action.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs-Appellees below, and Respondents in this Court, are all identified in the caption of this Petition for Writ of Certiorari. General Motors Corporation, Defendant-Appellant below and Petitioner in this Court, is the sole other party to this suit.

Petitioner, General Motors Corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioner General Motors Corporation ("GM"") respectfully prays that a writ of certiorari issue to review the judgment of the Oklahoma Court of Civil Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Civil Appeals of the State of Oklahoma (App., 1a-9a) is unreported. The opinion and order of the District Court in and for Bryan County, Oklahoma, granting Respondents' Motion for Class Certification (App., 10a-31a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the Oklahoma Court of Civil Appeals was entered on December 3, 2004. GM filed a timely Petition for Certiorari with the Supreme Court of Oklahoma on December 23, 2004. On April 4, 2005, the Supreme Court of Oklahoma denied GM's Petition for Certiorari. (App., 32a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of the federal constitution are set out in the Appendix, *infra*, at 33a.

STATEMENT OF THE CASE

The fifty States have decided to adopt widely divergent legal rules regarding limitations on actions for breach of warranty by their citizens. The issue raised in this case is whether a single State can use its class certification and choice-of-law rules to circumvent the legal rules and limitations adopted by the 49 other States. The Oklahoma Court of Civil Appeals allowed certification of a nationwide plaintiff class only because, following Oklahoma Supreme Court precedent, Oklahoma law allows the application of one State's laws to nationwide class actions involving hundreds of thousands of warranty claims, including the claims of the

vast majority of class members who have essentially no contact with the chosen State. Compounding this error, the court below also held that it was unnecessary to determine exactly which State's law would be applied to all class members until a trial on the merits. In other words, the court below held that class certification was allowable since one State's law could be applied to all class members, but that class members would have to make the decision to opt out of the litigation or remain as class members without knowing what State's law would be applied to the claims asserted.

1. This lawsuit was brought in the state court in Bryan County, Oklahoma, as a putative nationwide class action. App., at 11a. The class encompasses over 420,000 Chevrolet Malibu and Oldsmobile Cutlass vehicles[1] purchased, and in many instances resold, by consumers in all fifty States. Respondents alleged that the airbag system on the P-90 was defective because approximately one in every six thousand vehicles has an unwanted deployment.[2] However, the class definition excluded any person who had ever experienced a problem with the airbag in their vehicles. *Id.* According to Respondents' allegations, the basis of the suit is that 70 vehicles, out of the 420,000 included in the class, might at some time in the future experience an unwanted airbag deployment.

2. For causes of action, Respondents asserted breach of express warranty, breach of implied warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310, and "fraud, restitution-unjust

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1. Both vehicle models are often referred to in the record by their platform designation, P-90.

2. The National Highway and Transportation Safety Administration (NHTSA) inquired about inadvertent airbag deployment in the P-90 vehicles, and closed its inquiry without taking any action. App., at 16a.

enrichment." App., at 2a. Respondents subsequently withdrew the fraud claim from class consideration. *Id.* at 7a. Ultimately, the trial court certified the following class:

> All current owners and lessees of 1997-1999 General Motors P-90 platform automobiles manufactured in Oklahoma, encompassing all persons or entities resident in the United States who own or lease Chevrolet Malibu and Oldsmobile Cutlass models manufactured before April 24, 1999. Excluded from this class is any person, firm, corporation, trust or other entity related to or affiliated with Defendant General Motors or any person who has or had an action for personal injury or death against General Motors as a result of an inadvertent airbag deployment in such a vehicle.

Id. at 30a. Notably, 1997-1999 P-90 platform automobiles were manufactured in Oklahoma City, Oklahoma, and Wilmington, Delaware. However, Respondents did not seek to include in the class any owners, purchasers, or lessees of P-90 vehicles assembled in Wilmington, Delaware. Although Respondents argued to the trial court that Oklahoma law should govern the claims of all class members, the trial court specifically deferred making any ruling regarding what law would be applicable to the certified class. *Id.* at 28a. In this regard the trial court stated:

> [W]hen the Court makes its choice of law decision, the Court is mindful that the Oklahoma Supreme Court resolved this issue in *Ysbrand v. Daimler-Chrysler*, 81 P.3d 618 (Okla. 2003), where it held that a nationwide class of owners of Minivans equipped with defective airbags could properly bring their UCC warranty claims, express and implied, in the Oklahoma courts.

Id. at 28a.

GM appealed, raising federal-law issues in its initial statement of issues on appeal and throughout its appellate briefing. The Oklahoma Court of Appeals affirmed, holding that Oklahoma law allows the application of one State's laws to all class members' claims, specifically stating that:

> Under *Ysbrand* [*v. Daimler Chrysler Corp.*, 2003 OK 17, 81 P.3d 618, cert. denied 124 S.Ct. 2907 (2004)], Oklahoma's choice of law rules point to the application of only one State's law to the class' UCC warranty claims, namely, the State where GM's principal place of business is located and where decisions concerning the design, manufacture, and distribution of the P-90 air bag systems were made.

Id. at 6a-7a. The Court then held, however, that the applicable state law need not be identified prior to certification but rather could await trial on the merits, stating:

> The trial court has not yet determined in which State this conduct occurred. It need not do so until it reaches the merits of this action.

Id. Finally, the Court also held that identification of class members could also wait until the conclusion of the trial, stating:

> The trial court's judgment will "describe those whom the Court finds to be members of the class." 12 O.S. 2001 § 2023(c)(3).

Id. at 9a.

3. On December 23, 2004, GM filed a petition for certiorari with the Oklahoma Supreme Court seeking review of the Court of Appeals' opinion. Again, GM raised federal-law issues in its petition for certiorari. On April 4, 2005, the Oklahoma Supreme Court issued a one-line order denying the petition for certiorari, with six judges concurring in that decision, two dissenting, and one justice not participating. *Id.* at 32a. Given this decision, GM has no further appellate options in the Oklahoma state court system.

REASONS FOR GRANTING THE PETITION

The courts of Oklahoma have sanctioned an application of choice-of-law principles that, applied to an individual plaintiff, plainly would be constitutionally inadequate. But the protections of the Due Process and Commerce Clauses are no weaker in the context of a class action. In addition, Oklahoma's use of a nationwide class to override the conflicting warranty laws of other jurisdictions violates the Due Process and Commerce Clauses' restrictions on individual States' ability to extend their regulatory reach beyond their own borders. Notwithstanding this Court's prior guidance, the court below, consistent with other Oklahoma cases, allowed the Due Process and Commerce Clause protections to be diluted in order to expedite classwide adjudication. Oklahoma's choice-of-law and class certification decisions are becoming a means of overriding the regulatory decisions of sister States. This Court should grant review to provide much-needed guidance to courts considering requests to certify multistate plaintiff classes in actions premised on State law.[3]

I. The Oklahoma Court's Classwide Choice-of-Law Analysis Conflicts With Decisions Holding That Due Process Requires An Analysis Specific To Each Plaintiff

This Court has consistently held that plaintiffs in both individual and class actions do not enjoy an unfettered right to select the substantive law that governs their claims. Choice-of-law principles may not direct the application of a State's body of law to a plaintiff's claim if the State has little

3. The Class Action Fairness Act of 2005 ("CAFA") was passed to address the abuses of the class action process occurring in state courts, including "making judgments that impose their view of the law on other states and bind the rights of residents of these states." CAFA § 2(a)(4)(C). Unfortunately, there are numerous cases, like this one, which were pending in state courts before the CAFA was passed and, without this Court's guidance, will be subject to the abuses outlined in the CAFA.

or no connection with the underlying conduct, as the Due Process Clause precludes such an unforeseeable and unfair result. Lower federal and state courts have interpreted this Court's cases to require, in the context of a putative nationwide class action, that choice-of-law principles be applied to each potential plaintiff, not to the litigation as a whole with the goal of certifying a class. The court below ignored these decisions and instead applied a constitutionally deficient analysis, albeit one endorsed by the Oklahoma Supreme Court.

A. This Court's Decisions Preclude Applying A State's Law To Transactions In Which It Has No Significant Regulatory Interest

The Due Process Clause places a substantive limitation on choice-of-law determinations: although the forum State has some freedom to select among the applicable rules of decision, the selection must be made from among bodies of law to which the parties may constitutionally be subjected. This constitutional requirement cannot be subordinated to the State forum's desire to apply its lenient class-certification rules. The Oklahoma courts have erred by applying a different choice-of-law rule in class actions, with the express purpose to make a nationwide class possible.

The starting point for analyzing constitutional limits on choice-of-law rules in class actions is this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), which the court below cited but misconstrued. App. at 7a-8a. In *Shutts*, this Court considered the claims of a multistate class of plaintiffs who brought suit in Kansas state court against an out-of-state corporation. The state court agreed with plaintiffs that Kansas law should govern the claims of the entire class, citing the plaintiffs' choice of Kansas as the forum and that State's preference for applying its own law in its own courts absent exceptional circumstances. *Id.* at 803.

This Court reversed, holding that Kansas could not constitutionally apply its own law to the claims of the entire class. Even though Kansas had personal jurisdiction over both the defendant (through its conduct of business in that State) and the plaintiff class members (through their named representatives), these contacts were insufficient to justify applying Kansas law to the dispute, which involved a set of oil and gas leaseholds located in other States. 472 U.S. at 819-20. The choice of law was anything but academic since choosing one of the other potentially applicable rules of decision would change the outcome. Because there was a material conflict between the substantive law of Kansas and that of Texas and Oklahoma (the other possible sources of law), the due process rights of the parties were violated by imposing Kansas law. *Id.* at 817-18.

This Court specifically *rejected* the notion that these limitations can be relaxed in order to facilitate class action adjudication, holding that "constitutional limitations [on choice of law] must be respected even in a nationwide class action" and that a state "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirements that there be common issue of law." 472 U.S. at 821. Regardless of the form of the litigation, these constitutional principles must be applied to the claims of *each* class member since the State whose law is applied "must have a 'significant contact or significant aggregation of contacts' to the claims asserted *by each member of the plaintiff class*, contacts 'creating State interests,' in order to ensure that the choice of [that] law is not arbitrary or unfair." 472 U.S. at 821-22 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion)) (emphasis added). If the claims of some class members are based on "a transaction with little or no relationship to the forum," the forum State may not apply its own law solely to homogenize the plaintiffs' claims artificially and make them suitable for class-action

adjudication. *Id.* at 821. The class action, the Court stressed, is nothing more than a procedural device; the Constitution's substantive restrictions on a State's power to apply its own law beyond its borders are "not altered by the fact that it may be more difficult or more burdensome to comply . . . because of the large number of transactions which the State proposes to adjudicate" in a single action. *Id.*

The Court in *Shutts* also stressed the general principle that even a *named* plaintiff's choice of the forum is not controlling as to choice of law. 472 U.S. at 820 (citing *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936), and *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930)). Simply because the plaintiff chooses a court into which the defendant may be haled does not mean that the plaintiff may also choose his preferred body of *law* without limitation: "If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible." *Id.* (quoting *Allstate*, 449 U.S. at 337 (Powell, J., dissenting)) (internal quotation marks omitted; alteration in original). Due process does not permit a state court to subject a party to a body of substantive law that is so contrary to its expectations as to be "arbitrary and unfair." *Id.* at 822. That constitutional limitation precluded applying Kansas law to transactions involving property outside Kansas, an out-of-state defendant, and, for the most part, non-Kansas plaintiffs.

Shutts makes clear that the Oklahoma court erred by certifying a nationwide class according to an Oklahoma choice-of-law rule favoring classwide adjudication. The state court failed altogether to examine whether *either* Oklahoma *or* Michigan had a sufficient nexus with "each member of the plaintiff class," *Shutts*, 472 U.S. at 821, to justify applying either state's law on an *individual* basis. Rather, the state court committed precisely the error that *Shutts* condemns by forsaking individualized assessment of contacts for the sake of classwide adjudication.

The Oklahoma court's decision that one State's law could govern the claims of every class member in the country, contrary to customary choice-of-law principles and the reasonable expectations of not only GM but also class members, creates exactly the sort of unfair and arbitrary result that *Shutts* forbids. Oklahoma courts have recognized the general choice of law rule that "in a contract for a sale of goods, the most significant contact is the place of delivery unless another State has a more significant relationship." *Collins Radio Co. of Dallas, Tex. v. Bell*, 623 P.2d 1039, 1047 (Okla. Ct. App. 1980); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 191 & cmts. e, f. Yet, this rule is now routinely abandoned in Oklahoma once class action allegations are made. Since every State retains a significant interest in applying its own warranty law to products sold within its borders, that interest cannot be trumped by the desire of one State to allow nationwide class actions.

Although conducting the choice-of-law analysis on a classwide basis would conflict squarely with this Court's holding in *Shutts*, the application of one State's law to all class members' claims also contravenes other decisions of this Court. For example, in *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), this Court held that Texas could not constitutionally apply its own law to a Texas resident's contract claim that arose entirely outside Texas. *See id.* at 404, 407-10. Texas law, if applied, would have modified the insurance contract, "abrogat[ing] a contractual right and impos[ing] liability [where] the parties ha[d] agreed that there should be none." *Id.* at 406-07. Although the plaintiff suing on the contract was a permanent resident of Texas, "nothing in any way relating to the policy sued on . . . was ever done or required to be done in Texas." *Id.* at 408. This Court accordingly held that applying Texas law would violate the defendant's due process rights. *See also, e.g., Allstate*, 449 U.S. at 310-11 (plurality opinion) (*Dick* stands "for the proposition that if a State has only an insignificant contact

with the parties and the occurrence or transaction, application of its law is unconstitutional"); *id.* at 333 n.1 (Powell, J., dissenting) (*Dick* "is a case where the reasonable expectations of a litigant were frustrated" by the state court's application of a different body of law).

Dick makes clear that even in an *individual* action, the Constitution restricts courts from applying the substantive law of a State that lacks sufficient connection to the subject matter of the litigation. (*Dick* applied the Due Process Clause, but the same result would be obtained under the Commerce Clause's restrictions on extraterritorial regulation. *See infra* Section II; *cf. Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983).) The residence of one of the parties is insufficient, standing alone, when the litigation turns on actions that the party performed elsewhere – as in this case, in which plaintiffs' allege breach of express and implied warranties in connection with the sale of P-90 vehicles in every State. This constitutional problem is only heightened in the context of a nationwide class action like this one, in which a state court proposes to "bootstrap" one State's constitutionally insufficient contacts with individual litigants into constitutionally *sufficient* contacts with an entire class. *Shutts*, 472 U.S. at 821. Such a course of action is precisely what *Shutts* forbids. *See id.* at 822-23 (applying *Dick* in the class context).

B. Federal Courts Of Appeals And State Courts Have Adopted Conflicting Interpretations Of This Court's Decision in *Shutts*

This Court made clear in *Shutts* that due process precludes courts from applying by rote the law of the forum, the law that facilitates class certification, or the law of the plaintiffs' election. The federal courts of appeals and several state courts have applied that teaching and held that an individualized choice-of-law analysis is *required* before any multistate class involving state-law claims may be certified.

Other jurisdictions, however, have adopted rules similar to that espoused by Oklahoma, ordering the classwide application of a single State's law in order to facilitate the adjudication of nonresidents' claims. This Court's review is warranted to resolve this conflict.

The federal courts of appeals, which frequently are called upon to examine the certification of plaintiff classes in actions under state law, continue to apply *Shutts* faithfully, requiring an individualized choice-of-law analysis as part of the inquiry into the "commonality" and "predominance" requirements for class certification. Oklahoma and a few other jurisdictions have departed from this rule, creating a forum-shopping incentive that federal *Erie* rules are designed to mitigate, *see, e.g., Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

The Third Circuit has spoken most directly to this issue. In *Georgine v. Amcham Products*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amcham Prods. V. Windsor*, 521 U.S. 591 (1997), the court of appeals reversed the certification of a nationwide settlement class to resolve the claims of plaintiffs exposed to asbestos. The Third Circuit held, citing *Shutts*, that adjudication of the claims of the class members would require the court to "apply an *individualized* choice of law analysis to *each plaintiff's claims*." *Id.* at 627 (emphases added); *accord, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 742 n.15 (5th Cir. 1996). The court reached this conclusion despite arguably compelling policy reasons for nationwide adjudication in the context of asbestos, which both the Third Circuit and several members of this Court viewed as desirable, though legally unworkable. *Amchem*, 521 U.S. at 628-29; *id.* at 633-34 (Breyer, J., concurring in part and dissenting in part); *Georgine*, 83 F.3d at 634. The Third Circuit's reasoning applies with even greater force to cases like this one: "no injury" class actions that do not even

arguably address any nationwide problem. As this Court held in *Shutts*, the constitutional restrictions on choice of law do not yield to the procedural convenience of unified adjudication.

In a similar vein, the Ninth Circuit has rejected an attempt, much like Respondents', to satisfy the commonality and predominance requirements for class certification by demanding the application of a single State's law. The putative class in *Zinser v. Accufix Research Institute*, 253 F.3d 1180 (9th Cir. 2001), asked the district court to certify a nationwide class and to apply the products liability law of California, the forum State. *Id.* at 1185, 1187. The district court and the Ninth Circuit both recognized, and the plaintiffs ultimately conceded, that under *Shutts*, California law could not "be constitutionally applied to all putative class members." *Id.* at 1187. The court also rejected the plaintiffs' fallback position, to apply the law of the defendant's principal place of business to the entire class on the ground that "the application of a single state's law will allow claims to be adjudicated on a class basis." The court held that choice-of-law rules did not permit such a selection. *Id.* at 1187-88; *id.* at 1198-99 & n.3 (B. Fletcher, J., dissenting) (agreeing with the majority on the choice-of-law issue); *see also Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 n.6 (11th Cir. 1987) (affirming denial of certification because multiple States' laws applied, and citing *Shutts* to show that even if Georgia (the forum) "would require application of its own common law rules to some claims involving purchases in other states, the law of Georgia could be applied consistent with due process only if the particular transaction had some significant relation to Georgia").

The D.C. Circuit likewise has recognized the impropriety of assuming away the variations in the laws of the 50 States in order to facilitate class certification. In another product-defect case against an auto maker in which, as here,

UCC warranty provisions adopted by the various States provided the rule of decision, the court of appeals reversed the district court's certification of a nationwide class based on its failure to conduct a searching choice-of-law inquiry. *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016, 1019 (D.C. Cir. 1986) (Edwards and R.B. Ginsburg, JJ.). The district court certified the class without "inquir[ing] further into the existence and character of differences in state warranty laws." To "look to the [laws of] the many States" would make class certification "virtually impossible," the district court wrote, which suggested that it might apply the law of a single State, or of selected States. *Id.* at 1016 & n.90. As in this case, the lower court allowed the perceived virtue of unified adjudication to trump any conflict of law.

The D.C. Circuit reversed, refusing to take "on faith" the plaintiffs' assertion that no state-law variation would impede adjudication. The Uniform Commercial Code, the court noted, "is not uniform." 807 F.2d at 1016 (quoting J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 7 (2d ed. 1980)). Material variations in state law would prevent class certification on common questions of law. With respect to the possibility of applying a single State's law, the court of appeals noted *Shutts*' holding that selecting the law of a single State would be unconstitutional without a showing that that State "had a significant relationship to each class member's claim." *Id.* at 1016 n.90.

The state courts, which in recent years have become the preferred forum for putative nationwide class actions, have for the most part followed the federal courts in interpreting *Shutts* to require a choice-of-law analysis specific to each plaintiff. For example, another multistate class alleging airbag defects was decertified on appeal precisely because the trial court applied the law of the forum, Pennsylvania, to the claims of the entire class for breach of warranty and violation of state consumer-protection statutes. *Debbs v. Chrysler*

Corp., 810 A.2d 137, 158-59 (Pa. Super. 2002). The appellate court held that the trial court's failure to conduct a choice-of-law analysis before certifying the class violated the parties' "'due process right to have their claims governed by the state law applicable to their dispute.'" *Id.* (quoting *Shutts*, 472 U.S. at 821). The court also noted that "a trial court cannot sidestep choice-of-law issues by declaring that the class action would be governed by Pennsylvania law" in the interest of "administrative convenience." *Id.* at 159.

The courts of Texas have taken a similar approach. The Supreme Court of Texas clarified that it would not "apply the law of the state where a defendant is headquartered to every claim for economic damages that can be alleged against the defendant," and decertified a nationwide class accordingly. *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 698 (Tex. 2002). The Texas courts have interpreted *Henry Schein*, read together with *Shutts*, to bar precisely the sort of class-driven choice-of-law analysis that the Oklahoma Court engaged in here. For example, in rejecting a Texas trial court's certification of a nationwide class based on the law of Missouri (defendant's principal place of business), the state Court of Appeals cautioned that such an approach was unconstitutional: "The analysis must be conducted on an individual basis; a nationwide class is not entitled to a 'looser' analysis merely because applying one state's law would be easier than applying many." *Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349, 352 (Tex. Ct. App. 2003) (citing *Shutts*, 472 U.S. at 821-22) (footnote omitted). The court concluded that applying the law of each consumer's home State in accord with accepted choice-of-law principles, "would protect the parties' justified expectations." *Id.* at 357; *see also Shutts*, 472 U.S. at 822 ("When considering fairness in this context, an important element is the expectation of the parties."). The Oklahoma court in this case, by contrast, ignored those accepted choice-of-law principles and overrode GM's and the class members' justified expectations.

Not every state court has so faithfully applied *Shutts*. Some States have joined Oklahoma in implementing choice-of-law rules that expressly facilitate the certification of a nationwide class by applying a body of substantive law that would not apply to an individual claim. These States became magnets for putative plaintiff classes and their counsel.

For example, the Illinois courts have repeatedly upheld certification of nationwide classes based on Illinois law. *See, e.g., Martin v. Heinold Commodities, Inc.*, 510 N.E.2d 840, 846-47 (Ill. 1987). Indeed, in a number of instances, the Illinois courts have affirmed precisely what the Oklahoma Court allowed plaintiffs to accomplish in this case: application of a law of a single State based solely on the location of the defendant's headquarters. *E.g., id.*; *Clark v. TAP Pharm. Prods.*, 798 N.E.2d 123, 129 (Ill. App. Ct. 2003); *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242, 1254-55 (Ill. App. Ct. 2001), *appeal allowed*, 786 N.E.2d 180 (Ill. 2002). In *Clark*, for example, the court upheld the application of Illinois law to transactions between "non-Illinois class members" and "non-Illinois medical care providers," which "occurred in states other than Illinois." 798 N.E.2d at 129. This posed no constitutional problem, the court held, because the defendant was a corporation headquartered in Illinois. "'Illinois has a legitimate interest in applying its law . . . to insure that its residents [*i.e.*, corporations headquartered there] comply with its consumer-protection laws *while serving* Illinois and *out-of-state consumers*.'" *Id.* at 129-30 (quoting *Avery*, 746 N.E.2d at 1255) (emphasis added). The Illinois courts have consistently refused to concede the extraterritorial impact of the imposition of Illinois' substantive law in class actions involving non-Illinois residents.

The effect of these choice-of-law rules has been dramatic. Illinois state courts became a preferred venue for plaintiffs

seeking to represent nationwide classes. Citing the state courts' choice-of-law decisions, the Appellate Court of Illinois recently noted that "50-state class actions are not uncommon in Illinois." *P.J.'s Concrete Pumping Serv. V. Nextel W. Corp.*, 803 N.E.2d 1020, 1030 (Ill. App. Ct. 2004). The Illinois experience demonstrates the effect of a constitutionally erroneous choice-of-law rule like the one applied in this case: litigants dissatisfied with the rules that would govern them under ordinary choice-of-law principles sought jurisdictions with which they had no constitutionally significant contact but which would adjudicate their claims under a more favorable body of substantive law.

The courts of California have taken an intermediate approach to the choice-of-law problem in putative nationwide classes. The California Supreme Court has recognized, correctly, that applying California law to the claims of a nationwide class requires a showing that California has significant contacts with "the claims of each class member." *Wash. Mut. Bank v. Superior Court*, 15 P.3d 1071, 1080 (2001). However, the court has permitted the application of a different choice-of-law rule to nationwide classes by creating a burden-shifting procedure. First, the proponent of class certification must show that "the requisite significant contacts" exist between California and the claims asserted by the class. *Id.* at 1081. Once the proponent makes that showing, California law presumptively applies to the class claims unless the opposing party can show that the interests of other States outweigh California's and that the law of one or more foreign States should therefore control. The court rejected the argument that "California may not constitutionally weigh[t] the scales in favor of applying its own law." *Id.*

It is clear that some state appellate courts cannot or will not intervene to correct constitutional error in nationwide class actions; both they and the trial courts they supervise

require further guidance from this Court on the constitutional principles elucidated in *Shutts* and implicated in every multistate class action applying state law.

II. The Oklahoma Court's Nationwide Certification Conflicts With Decisions Interpreting the Commerce and Due Process Clauses' Restrictions on Extraterritorial Regulation By The States

The Oklahoma court's decision has a substantive impact in all 49 other States and the District of Columbia. The plaintiffs' causes of action under the Uniform Commercial Code cannot succeed unless the UCC warranty provisions are construed broadly, in a variety of ways. A number of the plaintiff class members' home States – where their vehicles were advertised, purchased, driven, and owned to this day without incident – have already *definitively rejected* one or more of the constructions of warranty law on which the plaintiffs' claims rest. Those States are entirely within their rights to provide that GM has breached no duty to their citizens. Yet the Oklahoma court's application of one state's substantive law to those transactions has the effect of displacing those States' own regulatory regimes and replacing them with one in which the Oklahoma courts may find a viable claim. "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1993), and no State may apply a rule of law that conflicts with this Court's decisions interpreting the constitutional constraints on extraterritorial regulation.

The Commerce Clause prohibits States from engaging in precisely this sort of extraterritorial regulation without the consent of Congress. In *Healy v. Beer Institute*, 491 U.S. 324 (1989), this Court struck down Connecticut's attempt to project its alcoholic beverage control regime into its neighbor States. *Id.* at 337. As in this case, Connecticut had adopted a regulatory regime that had the "undeniable effect of

controlling commercial activity occurring wholly outside the boundary of the State." *Id.*

The certification of a single body of law to govern the entire class in this case threatens to extinguish the contrary regulatory regimes of Oklahoma's sister States – regimes under which many class members' claims against GM are plainly barred. For example, many class members cannot recover under their own States' laws on a "no-injury" claim for breach of warranty like the one asserted here, a claim premised on an alleged, but unmanifested product defect that has caused no harm. *See, e.g., Briehl v. General Motors Corp.*, 172 F.3d 623, 627 (8th Cir. 1999) (listing numerous courts that have rejected claims based on alleged product defects that have not caused injury); *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 803-04 (E.D. La. 1998). Indeed, the other State where P-90 vehicles were assembled, Delaware, has specifically rejected the viability of the claims certified by the Oklahoma Court. *See Dalton v. Ford Motor Co.*, 2002 WL 338081 (Del. Super. Ct. 2002). Other class members could not recover because they purchased their vehicles from retailers, rather than from GM, and their home States require plaintiffs suing for breach of express warranty, implied warranty, or both to show vertical privity with the defendant. *E.g., Flory v. Silvercrest Indus.*, 633 P.2d 383, 387 (Ariz. 1981). Other States preclude class members who purchased a *used* minivan from suing GM, the original manufacturer, for breach of implied warranty. *See, e.g.*, CAL. CIV. CODE § 1791.1; *Southerland v. Northeast Datsun, Inc.*, 659 S.W.2d 889, 891 (Tex. Ct. App. 1983).

A substantial number of plaintiff class members assert claims that, if brought individually, would be governed by state law that precludes recovery. For example, to permit a Texas purchaser of a used P-90 vehicle to recover under some *other* State's law when the law of her *own* State precludes recovery against the manufacturer plainly amounts to

regulation of the market for used vehicles in Texas, a form of regulation unjustified by any contacts between the forum State and the transaction being regulated. Indeed, a number of the state-court cases certifying nationwide classes concede that the effect of such a decision is to regulate transactions with customers in other States. *E.g.*, *Clark*, 798 N.E.2d at 129-30 (applying Illinois consumer-protection law to companies "'serving Illinois and *out-of-state consumers.*'" (quoting *Avery*, 746 N.E.2d at 1255) (emphases added)).

This Court has consistently applied due process principles as well as the Commerce Clause to strike down such extraterritorial regulatory efforts. As Justice Stevens explained in *Allstate*, this Court's due process cases prohibit States from applying their own choice-of-law principles and substantive law with the effect of "materially enlarging the contractual obligations of one of the parties where that party had no reason to anticipate the possibility of such enlargement." 449 U.S. at 327 n. 16 (Stevens, J., concurring in the judgment). Here, although Texas law limits a manufacturer's implied warranty to the initial purchaser, the Oklahoma court's class certification decision effectively rewrites that contractual obligation and, if the substantive law ultimately applied contradicts Texas' rule, allows every Texas purchaser the additional opportunity to pass on the manufacturer's implied warranty through resale. The Oklahoma courts' nationwide certification thus rewrites GM's warranty obligations across the country.

Likewise, this Court's recent punitive damages cases expressly invoke the Due Process Clause's limitations on one State's power to punish conduct legal in other States. *E.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1522 (2003) ("A State cannot punish a defendant for conduct that may have been lawful where it occurred." (citations omitted)); *BMW*, 517 U.S. at 571-73 & n. 16 (same) (citing *Healy*, 491 U.S. at 335-36; *Bigelow v. Virginia*, 421

U.S. 809, 824 (1975); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914); and *Huntington v. Attrill*, 146 U.S. 657, 669 (1892)). Indeed, in *State Farm* this Court cited *Shutts* for the proposition that "[a]ny proper adjudication of conduct that occurred outside Utah [the forum State] to other persons" would be governed by the State laws applicable to those other persons. 123 S. Ct. at 1522.[4]

The Oklahoma court's decision effectively makes an end run around *State Farm* and *BMW*. By certifying a nationwide class according to a single State's law the court *requires* an Oklahoma court to consider awarding damages based on conduct legal where it occurred, because the class certification permits plaintiffs from States in which GM is unquestionably free of liability to pursue damages under another state's law. The certification of a nationwide class in this case is a plain circumvention of the federal system's restrictions on extraterritorial regulation, as set forth in this Court's cases. This Court should exercise plenary review to correct both the Oklahoma court's disregard of controlling authority and the resulting disruption of interstate commerce.

III. The Oklahoma Courts Deferral Of Determining What State's Law Will Be Applicable To Class Members' Claims Also Violates The Due Process Clause

This Court has recognized that "the class-action defendant has a great interest in insuring that the absent plaintiffs' claims are properly before the forum." *Shutts*, 472 U.S. at 809. Here, the process sanctioned by the Oklahoma court violates due process. As this Court has made abundantly clear, proper notice of a class action is a matter of due process

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4. For this reason, this litigation may put GM in a no-win situation: even if GM prevails in the Oklahoma action, some plaintiff class members may return to their home States to pursue warranty claims, claiming that they are not bound by the Oklahoma courts' application of another state's law to resolve their claims in GM's favor.

since class members will be bound by any final judgment. *Shutts*, 472 U.S. at 812; *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974). The necessity for proper notice is critical when, as here, the class includes persons who would not otherwise be subject to the jurisdiction of the courts in the State of Oklahoma. In *Shutts*, this court held that

> If a forum state wishes to bind an absent plaintiff concerning a claim for money damages or a similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. . . . The notice should describe the action and the plaintiffs' rights in it. Additionally we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

Shutts, 472 U.S. at 812.

In order for a description of "the action" in a class notice to be of any use, it must set forth the claims and the law which will govern the claims. For example, the Fifth Circuit held that due process requires not only that notice reach the parties affected but that it convey "information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action." *See Nissan Motor Corp. AntiTrust Litigation*, 552 F.2d 1088, 1103-05 (5th Cir. 1977). In other words, due process requires that the notice "contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment." *Id.*

In the present case, the Oklahoma court held that a choice of law determination could await trial on the merits.

Accordingly, class notice will necessarily violate class members' due process rights since such notice will not set out the law which would govern the substantive rights of the class members. As discussed above, the determination of applicable law will impact the substantive rights of class members. Many states do not recognize the validity of any of the claims, others would not allow used car purchasers to assert implied warranty claims, and others, including Oklahoma, do not recognize a claim for breach of the warranty of fitness for a particular purpose when the good is simply used in the ordinary manner for which the good was manufactured. *See Crysco Oil Field Service v. Hutchison-Hayes International*, 913 F.2d 850, 852 (10th Cir. 1990) (applying Oklahoma law). A reasonable class member must know what law will be applied in order to make an informed decision about whether to opt out or remain in the class, and the procedure adopted by the Oklahoma court, which would deny them necessary information, therefore violates the due process rights of class members. GM is correspondingly exposed to significant risk since even if it prevails, class members could argue they are not bound by any judgment because they were not afforded due process in determining whether to opt out.

IV. The Questions Presented Are Important and Recur Frequently, And Courts Conducting Nationwide Class Certification Proceedings Require This Court's Guidance At the Earliest Possible Stage

State courts are frequently requested to certify nationwide classes. Indeed, in certain state courts, requests for nationwide class certification are the norm rather than the exception. *E.g.*, DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS 124 n. 15 (2000) (reporting that one study found that more than half the certified classes in Alabama courts were nationwide in scope); Beisner & Miller, *They're Making a Federal Case Out of If . . . In State*

Court, 25 Harv. J.L. & Pub. Pol'y 143, 156-57, 160-61, 169 (noting the growth of nationwide class actions filed in state courts).

These cases create an acute need for guidance on the correct constitutional standard for choice-of-law determinations in nationwide class actions. Demands to apply the law of a single State in such actions are also common. Choice-of-law questions are presented in virtually *every* nationwide class action applying state law, and in many cases the resolution of those questions will be a dispositive factor in the decision whether or not to certify. Most States that allow class actions apply some version of the federal Rule 23 requirements of commonality, typicality, predominance, and manageability, *see* Fed. R. Civ. P. 23(a)(2), (a)(3), (b)(3), (b)(3)(D), all of which are directly implicated by a decision that the law of multiple States governs the claims of the class. *See Henry Schein*, 102 S.W.3d at 698 nn.91-92 (collecting dozens of federal and state cases in which the need to apply multiple States' laws was dispositive of class certification). Thus, guidance from this Court on the choice-of-law question will likely affect many class-certification decisions in multistate class actions brought in both state and federal courts.

The conflicting decisions of those courts make the need for review all the more urgent. Even if only a few States, or even one State, misapply this Court's Due Process and Commerce Clause precedents to create choice-of-law rules that permit the nationwide application of one state's law, the public policies of all other 49 states are overridden. For this reason, the interstate conflict created by the decision of the Oklahoma Court and a few other state courts is of considerable significance to the federal system, and this Court's review is warranted to correct it.

V. The Judgment Below Is Final For Purposes Of This Court's Review Under 28 U.S.C. § 1257(a)

The decision below finally resolved the important questions of federal constitutional law presented in this petition. The Oklahoma Court squarely rejected GM's arguments that the federal Constitution precludes courts from certifying a nationwide class without conducting a choice-of-law analysis specific to the individual class members' claims. If not reviewed *now*, the decision below threatens to erode fundamental principles of federalism – including constitutional limits on choice of law and comity among sister States – and to evade review altogether. Accordingly, the judgment is final for purposes of 28 U.S.C. § 1257(a).

The Court follows a "pragmatic approach" when determining whether a state court decision is "final" under § 1257(a). *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975). There are "at least four categories" of cases in which a judgment is sufficiently final to justify this Court's review even though further proceedings remain to be held in state court. *Id.* at 477. The fourth such category involves "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits of nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court," and where "reversal of the state court on the federal issue would be preclusive of any further litigation." *Id.* at 482-83. In these circumstances, "if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.* at 483; *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-80 (1988) (granting certiorari where the decision below "might seriously erode federal policy in the area of nuclear production"); *Southland Corp.*

v. Keating, 465 U.S. 1, 6-8 (1984) (granting certiorari where the decision below threatened to erode enforcement of arbitration agreements under the Federal Arbitration Act).

The fourth *Cox Broadcasting* category is applicable here. The constitutional issues presented in the petition have been finally decided by the court below, which rejected GM's contention that certification of a nationwide class action, without conducting a choice-of-law analysis specific to the individual class members' claims, violates several provisions of the federal Constitution. Although the state court remanded for further proceedings, such proceedings will not crystallize or finalize the disposition of the federal questions; to the contrary, the litigation may well terminate on the basis of nonfederal issues, thereby depriving this Court of the opportunity to decide the important constitutional issues at stake. *Cox Broadcasting*, 420 U.S. at 482.

Furthermore, reversal of the decision below would be "preclusive of any further litigation on the relevant cause of action." *Cox Broadcasting*, 420 U.S. at 482-83. A determination by this Court that the Constitution requires that the laws of all 50 states and the District of Columbia be applied to the nationwide class members' claims would terminate this litigation as a practical matter. The Oklahoma Supreme Court has acknowledged that "[a]pplying the law of 51 jurisdictions . . . presents an overwhelming burden which would make the class unmanageable and a class action determination . . . inappropriate." *Ysbrand*, 81 P.3d at 627. Accordingly, reversal of the decision below would, for all practical purposes, terminate the lawsuit.

Finally, it is readily apparent that "a refusal immediately to review the state-court decision might seriously erode federal policy." *Cox Broadcasting*, 420 U.S. at 483. The Oklahoma courts' certification of a nationwide class, without conducting a choice-of-law analysis specific to individual class members' claims, heavily undermines constitutional

interests in federalism. These interests, through the Commerce and Due Process Clauses, restrain an individual state court's authority within our federal system.

Where, as here, the federal issue concerns the basic authority of the state court to adjudicate specific claims between specific litigants, this Court consistently has exercised jurisdiction despite the availability of further state court proceedings that might lead to the termination of the dispute on non-federal grounds. For example, this Court has taken jurisdiction to decide whether the state court in which further proceedings would be held had the authority to adjudicate a dispute or instead was required by federal law to refer it to arbitration. *Southland Corp.*, 465 U.S. at 6-7. Similarly, this Court has reviewed the question whether the state court lacked personal jurisdiction over a defendant and thus, under the Due Process Clause, could not adjudicate the dispute. *Calder v. Jones*, 465 U.S. 783, 788 (1984); *Shaffer v. Heitner*, 433 U.S. 186, 195-96 n.12 (1977). And this Court similarly exercised jurisdiction to decide whether the state court lacked authority to adjudicate a claim because federal law compelled a change of venue. *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 649-52 (1992); *Am. Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 640-42 (1976); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963).

In this case, the federalism issues implicated by the ruling below are just as significant and deserving of immediate review, if not more so. *Cf., e.g., P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993) (reviewing an interlocutory sovereign immunity claim owing to the "importance of ensuring that the States' dignitary interests can be fully vindicated"). The federal question is the constitutionality of the state court's proposed adjudication: not only does further delay entail exponentially greater cost, it imposes on GM precisely the burden against which it is invoking the protections of the Due Process and Commerce

Clauses. Where federal policies affecting the scope and form of litigation are at issue, it serves the underlying policy of finality "to determine now [how] appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question . . . is postponed until the conclusion of the proceedings." *Mercantile Nat'l Bank*, 371 U.S. at 558; *see also Southland Corp.*, 465 U.S. at 7-8 (noting that delayed review of a state decision denying enforcement of an arbitration contract would defeat the core purpose of a contract to arbitrate).[5]

Moreover, a grant of class status "can propel the stakes of a case into the stratosphere," thereby pressuring a defendant to settle and precluding future review of federal issues, "even when the plaintiff's probability of success on the merits is slight." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (noting that "some plaintiffs or even some . . . judges may be tempted to use the class device to wring settlements from defendants"). Indeed, such settlement pressures were a motivating factor behind this Court's adoption of Rule 23(f) of the Federal Rules of Civil Procedure in 1998. FED. R. CIV. P. 23(f) advisory committee's notes ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially

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5. This Court has not previously considered whether a *grant* of class certification is reviewable under *Cox Broadcasting*. In *Coopers & Lybrand v. Liveway*, 437 U.S. 463 (1978), the Court considered whether a denial (rather than a grant) of class certification was "final" under 28 U.S.C. § 1291, not § 1257. Similarly, in *Gillette Co. v. Miner*, 459 U.S. 86 (1982) (per curiam), the Court, which dismissed certiorari for want of jurisdiction without further explanation, was asked to consider a federal interest different from the one raised here. *Gillette* concerned the constitutionality of a state court's personal jurisdiction over unnamed class plaintiffs, while this petition concerns constitutional limitations on a state's choice of law with respect to specific transactions. *See Shutts*, 472 U.S. at 821 ("The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law.").

ruinous liability."). Notably, federal courts of appeals are instructed that their discretion to conduct interlocutory review under Rule 23(f) is "akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." *Id.*[6] The possibility of certiorari review reduces the danger that a constitutionally erroneous class certification (and the resulting impact on interstate federalism) will never be reviewed precisely because a nationwide class even advancing meritless claims poses a real threat of crippling liability, "'economic waste and . . . delayed justice'" that could create undue incentives to settle. *Cox Broadcasting*, 420 U.S. at 477-78 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)); *see Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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6. All federal circuits that have interpreted Rule 23(f) have recognized that interlocutory appeal is appropriate "when the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claims is substantial." *Blair*, 181 F.3d at 835; *see also Tilley v. TJX Cos.*, 345 F.3d 34, 37 (1st Cir. 2003); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002) (same); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1272, 1274 (11th Cir. 2000) (same).

APPENDIX

APPENDIX A — OPINION OF THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION III FILED DECEMBER 3, 2004

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION III

Case No. 100,474

DELMAS FORD, former Secretary of the Oklahoma Department of Transportation; JANE DOE; SHIRLEY CARTWRIGHT; BERT CROSSLAND; MARGARET CROSSLAND; and JOHN DOE,

Plaintiffs/Appellees,

vs.

THE GENERAL MOTORS CORPORATION, a Delaware Corporation,

Defendant/Appellant.

APPEAL FROM THE DISTRICT COURT OF BYRON COUNTY, OKLAHOMA

HONORABLE FARRELL M. HATCH, TRIAL JUDGE

AFFIRMED

OPINION BY CAROL M. HANSEN, Judge:

Defendant/Appellant, The General Motors Corporation (GM), seeks review of the trial court's order certifying this

case as a class action. We follow *Ysbrand v. DaimlerChrysler Corp. (Ysbrand)*, 2003 OK 17, 81 P.3d 618, *cert. denied*, 124 S. Ct. 2907, 72 USLW 3633, 72 USLW 3766, 72 USLW 3768 (2004), and affirm.

Plaintiff/Appellees, Delmas Ford and others (collectively Owners), sued GM, alleging the air bag system in the 1997, 1998, and 1999 GM P-90 platform automobiles, manufactured in Oklahoma, was defective, resulting in inadvertent air bag deployment. Owners asserted claims for (1) breach of express warranty, (2) breach of implied warranty of merchantability, (3) breach of implied warranty of fitness for a particular purpose, (4) violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310, and (5) "unjust enrichment/ restitution/deceit." After an unsuccessful attempt to remove the case to federal court, GM answered and denied liability.

Owners moved to certify the case as a class action. After a hearing and over GM's objection, the trial court found the requirements of 12 O.S. 2001 § 2023 were met. It certified the following class:

> All current owners and lessees of 1997-1999 General Motors P-90 platform automobiles manufactured in Oklahoma, encompassing all persons or entities resident in the United States who own or lease Chevrolet Malibu and Oldsmobile Cutlass models manufactured before April 24, 1999. Excluded from this class is any person, firm, corporation, trust or other entity related to or affiliated with defendant General Motors or any person who has or had an action

for personal injury or death against General Motorsas a result of an inadvertent airbag deployment in such vehicle.

GM appeals pursuant to 12 O.S. Supp. 2001 § 993(A)(6).

In order to certify a class, the trial court must find (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of those of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. 12 O.S. 2001 § 2023(A). In addition, it must find one of the alternative conditions of Subsection B of § 2023, relating to the practical utility of a class action for deciding the group's claims. "Class determination... should be made by the court in a practical and realistic manner, based on what is actually involved in the litigation. No mechanical formula exists which can be applied to all cases." *Mattoon v. City of Norman*, 1981 OK 92, 633 P.2d 735, 740-741. We will not disturb an order certifying a class unless abuse of discretion is shown. *Black Hawk v. Exxon*, 1998 OK 70 ¶ 10, 969 P.2d 337, 342. A close question should be resolved in favor of sustaining certification because the order is always subject to modification prior to judgment on the merits. *Perry v. Meek*, 1980 OK 151 ¶ 19, 618 P.2d 934, 940.

I

GM first contends the trial court abused its discretion in certifying a class because common issues do not predominate. It argues the trial court should have identified what claims

were being certified and what law would be applied to classmembers' claims. GM argues the class certified would require the application of the law of all fifty states, and the variation in state laws would overwhelm the proceedings, defeating the commonality, predominance, and manageability requirements for class certification. GM contends the application of Oklahoma law to all class members is inconsistent with Oklahoma choice of law rules and would violate the United States Constitution.

The Oklahoma Supreme Court considered these issues in *Ysbrand v. DaimlerChrysler Corp. (Ysbrand)*, 2003 OK 17, 81 P.3d 618. In that case, the plaintiffs were owners of 1996 or 1997 model minivans manufactured by DaimlerChrysler in Michigan. They alleged the minivans' air bags were defective due to their propensity to deploy with overly aggressive force and during low speed collisions. The owners asserted Uniform Commercial Code (UCC) claims for breach of express warranty, implied warranty of merchantability, and implied warranty of fitness. They also asserted a claim for fraud and deceit. *Id.*, 81 P.3d at 621. The trial court certified a nation-wide class of owners of the subject minivans.

DaimlerChrysler appealed the class certification order, contending common issues of law or fact did not predominate because varying state laws would apply to the asserted claims and defenses. In affirming class certification as to the UCC breach of warranty claims, the Court analyzed Oklahoma choice of law rules:

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The "most significant relationship" test applies to an action for breach of warranty in a sale of goods under Article 2 of the UCC.... This test is guided by principles and contacts from the Restatement (Second) of Conflicts (1971). It determines which state's law is most directly connected to the parties and the transaction.

...All 50 states and the District of Columbia bear some relationship to the parties and transactions in this dispute by virtue of the nationwide sales of the minivans. The question becomes whether the relationship of each state where the vehicles were purchased is more significant to the parties and this litigation than that of Michigan, the principal place of business of DaimlerChrysler.

...The UCC warranties are not something which is negotiated in the purchase of a new car. Thus, the relative interest of each buyer's home state in applying its version of the UCC is more or less equal. By contrast, Michigan's interest in having its regulatory scheme applied to the conduct of a Michigan manufacturer is most significant. Michigan is where the decisions concerning the design, manufacture, and distribution of the minivans were made. Michigan is the only state where conduct relevant to all class members occurred. The principal place of DaimlerChrysler's business is the most important contact with respect to the UCC warranty claims.

> ...Michigan's interest in the conduct of its manufacturer, and thus its connection to the warranty issues, is greater. Michigan law applies. It should be noted that this conclusion is consistent with the constitutional imperative that "for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."

Id., 81 P.3d at 625-626 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)).

The *Ysbrand* Court reversed class certification only as to the fraud and misrepresentation claims because class members would have received the representation in their home states, making each member's home state the most significant contact. Applying the law of 51 jurisdictions would render the class action unmanageable. *Id.*, 81 P.3d at 627.

In the instant case, the trial court considered the choice of law analyses presented by both parties and concluded GM overstated the choice of law issue. Relying on *Ysbrand*, it rejected GM's argument the need to apply different states' laws destroyed its predominance finding. We agree. Under *Ysbrand*, Oklahoma's choice of law rules point to the application of only one state's law to the class's UCC warranty claims, namely, the state where GM's principal place of business is located and where decisions concerning the

design, manufacture, and distribution of the P-90 air bag systems were made. The trial court did not abuse its discretion in determining common issues predominate.

The trial court has not yet determined in which state this conduct occurred. It need not do so until it reaches the merits of this action. In *Lobo Exploration Co. v. Amoco Production Co.*, 1999 OK CIV APP 112, 991 P.2d 1048, 1051, *cert. denied*, 529 U.S. 1124, 120 S.Ct. 1996, 146 L. Ed. 2d 821 (2000), the Court concluded *Shutts* did not require resolution of conflict of laws questions prior to certifying a class. While the existence of a conflict of laws issue is an appropriate consideration in determining whether common issues of law predominate, reservation of the issue is not an abuse of discretion.

GM argues Owners asserted a fraud claim but admits Owners announced to the trial court they were withdrawing the fraud claim from class consideration. Owners confirm in their answer brief they no longer posit a fraud claim. Therefore, we need not consider the impact of a fraud claim on class certification.

II

GM next contends a class action is not a superior method of handling the controversy. It argues the National Highway and Transportation Safety Administration (NHTSA) is a more appropriate forum for automobile defect claims because NHTSA may order a recall and require the manufacturer to remedy the defect. In *Ysbrand*, the Oklahoma Supreme Court ruled a NHTSA administrative proceeding could not be

considered a superior method for adjudication after NHTSA had closed its investigation because that method was no longer available. *Ysbrand*, 81 P.2d at 627-628.

The trial court in the instant case found NHTSA had already closed its inquiry into GM's P-90 air bags. GM argues in its brief-in-chief, filed on June 30, 2004, that the trial court's finding is unsupported by evidence in the record. However, on October 8, 2004, GM and Owners filed a joint stipulation agreeing a copy of the NHTSA closing letter was properly part of the record.[1] The Oklahoma Supreme Court issued an order accepting the stipulation. This record establishes the trial court's finding is supported by the evidence. We find no abuse of discretion.

III

GM's next contention is the class is defined in such a way that (1) the class members lack standing to sue because the alleged defect has not manifested itself in their cars, and (2) the membership of the class is constantly changing and not ascertainable. GM raised the issue of standing in its motion to dismiss, which the trial court denied. That order is not before us. "[T]he merits of an action are not judged in

1. The stipulation stated that at the February 4, 2004 hearing on class certification, Owners' counsel informed the trial court NHTSA had closed its investigation. GM's counsel stated he would take it as true that the investigation had been closed and that Owners' counsel would supply a copy of the closing letter to the court. The NHTSA closing letter had been produced to Owners by GM prior to the hearing. Owners' counsel delivered the closing letter to the trial court on February 12, 2004, and it is Exhibit H in the record on appeal.

ruling on a motion for class certification." *KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 2000 OK 51, 9 P.3d 683, 687. Motor vehicles are titled personal property. 47 O.S. 2001 § 1103. Therefore, the identity of the owners of motor vehicles is readily ascertainable. The trial court may exercise its discretion in managing the procedural issues in the case, including the manner and time of giving notice to class members. 12 O.S. 2001 § 2023(C)(2) and (D)(2). The trial court's judgment will "describe those whom the court finds to be members of the class." 12 O.S. 2001 § 2023(C)(3). We find no abuse of discretion in the definition of the class.

For the foregoing reasons, the trial court's order certifying a class action is AFFIRMED. Owners' motion to file a surreply brief to call the Court's attention to the joint stipulation filed after the close of briefing is granted. GM's motion for oral argument is denied.

JOPLIN, J., and MITCHELL, P.J., concur.

APPENDIX B — MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION IN THE DISTRICT COURT OF BYRAN COUNTY, STATE OF OKLAHOMA ENTERED FEBRUARY 18, 2004 FILED FEBRUARY 19, 2004

IN THE THE DISTRICT COURT OF BYRAN COUNTY STATE OF OKLAHOMA

Case No. CJ-2002-424

DELMAS FORD, former Secretary of the Oklahoma Department of Transportation, JANE DOE, SHIRLEY CARTWRIGHT, BERT CROSSLAND, MARGARET CROSSLAND, and JOHN DOE,

Plaintiffs,

v.

THE GENERAL MOTORS CORPORATION, a Delaware corporation,

Defendant.

MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This Cause is before the Court on Plaintiffs' Motion for Class Certification. This Court has reviewed and considered all of the pleadings in this matter, the parties' respective briefs, and the documents, exhibits, presentations, admissions and arguments received in evidence during the class

certification hearing commenced on February 4, 2004. Both counsel for Plaintiffs and counsel for Defendants provided to this Court proposed Orders, as agreed at the hearing on February 4, 2004. Based on the foregoing, the Court GRANTS Plaintiffs' motion based upon the following Findings of Fact and Conclusions of Law:

FACTUAL BACKGROUND

A. Plaintiffs' Claims

Class certifications in Oklahoma are governed by 12 O.S. § 2023. Before proceeding to analyze the requirements of section 2023, it is necessary for the Court to analyze the factual background upon which the plaintiffs' lawsuit rests. In doing so, the Court is cognizant of its role at this stage of the proceedings. As the United States Supreme Court has stated:

> *[N]othing in either the language or history of Rule 23* . . . gives a court *any authority* to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule. . .

Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177 (1974) (emphasis added). The only question before the Court is whether § 2023's requirements for class certification are met. *Black Hawk Oil Co. v. Exxon Corp.*, 969 P.2d 337, 343 (Okla. 1998), citing *Eisen* as authority. Because this Court is heeding Section 2023's requirement that the class certification issue

be resolved "as soon as practicable," the Court has endeavored to carefully balance its obligation to conduct a full and complete review of the class issues with *Eisen's* admonitions that "pre-trial hearings are to be carefully limited" and that "the trial court's guess as to which party would prevail at trial should have no bearing on the allowance or disallowance of a proposed class action." *Eisen*, 417 U.S. at 177. Consequently, like the numerous Courts that have followed *Eisen's* holding[1], this Court, while conducting a review of the parties' legal arguments and proposed proof, declines to undertake an examination of the merits of the claims and defenses in connection with the class determination. What follows is a description of plaintiffs' claim, as pleaded in this litigation.[2]

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1. *See Eggleston v. Chicago Journeyman Plumbers*, 657 F.2d 890, 895 (7th Cir. 1981) (citing *Eisen*); *Harris v. General Develop. Corp.*, 127 F.R.D. 658 (N.D. Ill. 1989) ("For the purpose of ruling on plaintiffs' motion for class certification, plaintiffs' allegations are taken as true and the court may not make an inquiry into the merits of the lawsuit."); *Peil v. National Semiconductor Corp.*, 86 F.R.D. 357, 365, 368 (E.D.Pa. 1980) ("The Court, when properly exercising its discretion, may consider the pleadings and facts procured through the discovery process to identify the character or type (but not the merits) of . . . plaintiff's claim and then to determine whether there was a class . . . The Court will not engage in a discussion of the merits of the plaintiff's case in relation to this standard. [*Eisen, supra*]").

2. The Court believes that, while it cannot and should not resolve merits issues, it is important to understand the plaintiffs' claims. The plaintiffs have presented to the Court an outline of their evidence and claims against the defendant. The Court assumes that GM disputes this evidence. What follows is a review of the claims proffered by the plaintiffs. The Court is providing this review to

(Cont'd)

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Plaintiffs seek to represent a class composed of the following persons:

> All current owners and lessees of 1997-1999 General Motors P-90 platform automobiles manufactured in Oklahoma, encompassing all persons or entities resident in the United States who own or lease Chevrolet Malibu and Oldsmobile Cutlass models manufactured before April 24, 1999. Excluded from this class is any person, firm, corporation, trust or other entity related to or affiliated with defendant General Motors or any person who has or had an action for personal injury or death against General Motors as a result of an inadvertent airbag deployment in such vehicle.

Plaintiffs seek to certify a national class action against General Motors for the purpose of litigating all claims extant for the subject air bag systems in one forum and proceeding. Defendant General Motors is the manufacturer of Oldsmobile Cutlass and Chevrolet Malibu. These vehicles are known as "GM P-90" platform automobiles. All of the automobiles that are the subject of this litigation are GM P-90 platform automobiles manufactured by General Motors in Oklahoma City, Oklahoma from model year 1997 through April 24, 1999. Plaintiffs, Shirley Cartwright and Delmas Ford, are

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(Cont'd)
illustrate the nature of the claims — not because it has concluded that the plaintiffs' position is correct. Suffice to say that the defendant vigorously contests the vast majority of the factual claims made by the plaintiffs.

owners of a GM P-90 Oldsmobile Cutlass and a GM P-90 Chevrolet Malibu, respectively. Shirley Cartwright and Delmas Ford have asserted claims for breach of express warranty, breach of implied warranty of merchantability and breach of implied warranty of fitness, all as provided by the Uniform Commercial Code, claims under Magnuson-Moss as well as unjust enrichment against General Motors in the form of a class action suit.

Plaintiffs have based their claims on the grounds that the air bag systems in these automobiles are defective in nature and/or design based on their propensity to deploy when they should not, such as during a low speed collision, when hitting a pothole, driving over a railroad track or gravel road, or in a side impact collision. Plaintiffs assert that the air bag systems installed in their automobiles are unreasonably dangerous in that they have the potential to kill or seriously injure any person seated in the driver or front passenger seat of their automobiles, the potential to cause accidents by rendering the driver unable to properly maneuver his or her automobile in situations that would otherwise constitute normal driving conditions. Plaintiffs further assert that they have an additional recognizable injury in that the value of the unsafe vehicles that Plaintiffs actually received is substantially less than the value of the safer vehicles that Plaintiffs were lead to believe they were purchasing or leasing.

In GM P-90 platform automobiles manufactured in Oklahoma in 1997-1999, the decision to deploy an air bag is made by a computer called a Sensing Diagnostic Module (SDM-R), using a computer program known as an algorithm.

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In many automobiles, including many other GM automobiles, the Sensing Diagnostic Module's decision-making process for the deploy/not-deploy decision is assisted by an Auxiliary Discriminating Sensor (ADS), the purpose of which is to discriminate between those accidents in which the air bag should deploy and those events in which the air bag should not deploy. The "R" in SDM-R stands for "reduced cost."

The SDM-R air bag system installed in GM P-90 platform automobiles in 1997-1999 was placed on the floor pan and programmed with an algorithm that causes the SDM-R to be overly sensitive to sensor data. In these automobiles there is no ADS to neutralize the impact of this data from the single source. As a result of the placement of the SDM-R and the software programming defect, the GM P-90 automobiles manufactured in 1997-1999 are subject to inadvertent air bag deployments in non-serious injury accidents and in non-accident situations where the SDM-R misreads the data it receives. In these non-accident circumstances, the deployment of the airbag may cause serious injury or death. The estimated cost of retrofitting an automobile with the new algorithm is approximately $500 per vehicle.[3]

All of the vehicles in the class contained the same airbag restraint system with the same sensing system, algorithm, and SDM-R. None of the vehicles in the class contain an ADS. At the time of manufacture, this alleged defect existed in each of these vehicles. In addition, with respect to the airbag restraint systems, the owners' manuals for all vehicles

3. The cost to replace an air bag system that has deployed is between $800-$1500 per automobile.

in the class were substantially similar and the advertising employed by GM to induce persons to purchase the automobiles similarly stressed the safety aspects of the automobiles.

GM utilized a similar air bag system in its 1997 GM-J platform automobiles. In 1998, GM recalled the 1996-1997 Chevrolet Cavalier and 1996-1997 Pontiac Sunfre (GM-J platform cars) to correct the problem of inadvertent deployment of its air bag system. The recall was based on GM's determination that the increased risk of inadvertent deployment of the air bag system was a safety defect and that it affected the customer's satisfaction with the vehicle.

To correct the inadvertent deployment problem in the air bag system, Defendant GM altered the algorithm in the SDM-R in GM P-90 platform automobiles beginning with production on April 24, 1999. GM has never recalled the 1997-1999 GM P-90 platform automobiles, nor informed the owners or lessors of the defective airbag system.

In response to inquiries from the National Highway and Transportation Safety Administration (NHTSA) concerning inadvertent deployments in GM P-90 automobiles, GM reported statistics that included GM P-90 automobiles that were manufactured after GM began installing SDM-R's with the corrected algorithm software, that is, manufactured after April 24, 1999. This resulted in the report to NHTSA of statistics of inadvertent deployments per ten thousand vehicles that were artificially low because the statistics included both defectively manufactured cars and cars manufactured with corrected air bag systems. NHTSA

subsequently closed its inquiry without further action on this matter based on GM's self-report.

Plaintiffs have requested that they and the members of the class be compensated in an amount sufficient to allow them to have these safer air bag systems installed in their automobiles or, in the alternative, for the difference in value between the vehicles they purchased and the vehicles they actually received.

CONCLUSIONS OF LAW

A. General Legal Standards Governing Class Certification

Class actions are an "invention of equity" born of the need to provide a procedural device so that large groups of individuals would not be disabled by their sheer number from enforcing their rights. *See* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1751 (2nd Ed. 1986). Because Oklahoma's class action procedure closely mirrors Federal Rule 23, Oklahoma courts may look to federal law for guidance and enlightenment on class action issues. *See Shores v. First City Bank Corp.*, 689 P.2d 299, 300 (Okla. 1984). The United States Supreme Court has noted that "[c]lass actions serve an important function in our system of civil justice." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981). This is because class actions pennit plaintiffs to "vindicate the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338, *reh'g denied*, 445 U.S. 947 (1980).

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Class certification is a procedural issue that should be resolved expeditiously. The Okla. Stat. Ann. Title 12 § 2023(c)(1) mandates that the determination of class certification shall be determined "as soon as practicable after the commencement" of the action. A close question regarding class certification should be resolved in favor of class certification. *Lobo Exploration Co. v. Amoco Production Co.*, 991 P.2d 1048, 1050 (Okla. 1999). "Class certification is a matter committed to the discretion of the trial court." *Ysbrand v. Daimler Chrysler Corp.*, 81 P.3d 618 (Okla. 2003).

B. Legal Standard Governing Class Certification

The statutory requirements for maintaining a class action are listed in 2023(A): a class is properly certified if numerosity, commonality, typicality and adequacy of representation are present. Each of these requirements will be considered below. It is noted that GM did not dispute numerosity or the adequacy of representation at the hearing.

1. Numerosty.

Section 2023(A)(l) requires that the proponent of a class action demonstrate that "the class is so numerous that joinder of all member, is impracticable." 12 Okl.Stat.Ann. § 2023(A). GM does not dispute numerosity, and could not. The record in this case indicates that there were at least 400,000 automobiles produced in the 1997 to 1999 model years that fit the class definition. The numerosity test is satisfied by numbers alone when the size of the class is in the hundreds. *Black Hawk Oil Co. v. Exxon Corp.*, 969 P.2d 337 (Okla. 1998). This Court finds that joinder is impracticable due to the sheer volume of automobile owners involved.

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2. Common Questions of Law or Fact.

Section 2023(A)(2) requires that the proponent of the class action demonstrate that "there are questions of law *or* fact common to the class." 12 Okl.Stat.Ann. § 2023(A) (emphasis added). Section 2023(A)(2) does not require that all questions be common or that common questions predominate. Indeed, in the court's Rule 23(A) inquiry, a single common question is sufficient to satisfy this requirement. *See Perry v. Meek*, 618 P.2d 934 (Okla. 1980).

A common question is one that "arises from a common nucleus of operative facts regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants." *Cohen v. Uniroyal, Inc.*, 77 F.R.D. 685, 690-91 (E.D. Pa. 1977). Indeed, the presence of one common question of law *or* fact is sufficient to certify a class. *Perry v. Meek*, 618 P.2d 934 (Okla. 1998); *In re: Prudential Ins. Co. of America Sales Practice Litigation Agent Action*, 148 F.3d 283, 310 (3rd Cir. 1998); *Stewart v. Winter*, 669 F. 2d 328 (5th Cir. 1982); *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526 (5th Cir. 1978).

Plaintiffs have argued that commonality exists among the class members because the claims of each potential class member relate to the installation of identical allegedly dangerous air bag systems in their automobile, and the act of withholding information concerning this defect from the vehicle owners and NHTSA by General Motors. Plaintiffs argue that the questions of law and fact common to the class include:

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1) Whether the air bag systems installed in the automobiles sold to the named plaintiffs and members of the class are defective and unreasonably dangerous for their intended use because of the likelihood of inadvertent deployment;

2) Whether defendants deliberately withheld from named plaintiffs and the members of the class and NHTSA vital information regarding the dangerous characteristics of the airbag systems installed in their automobiles;

3) Whether plaintiffs have been harmed economically by: being forced to bear the cost of retrofitting their automobiles with air bags, related sensors and electronic components, and by being required to absorb the diminution of value in resale of their vehicle, as well as its diminished utility;

4) Whether GM has been unjustly enriched by its sale of vehicles for which it received full price but in which it placed components that decreased the value of the automobile;

5) Whether GM breached its warranties, implied and express, by selling automobiles containing defective air bag systems subject to inadvertent deployment.

Plaintiffs argue that their claims against General Motors arise from the same set of alleged operative facts, i.e., the installation of identical air bag systems in each of their

vehicles and the act of withholding safety related information from them. Plaintiffs contend that none of the class members were ever informed about the true nature of their defective airbag systems. Thus, the operative facts present give rise to claims against General Motors that are common to the entire class. A determination regarding whether the subject air bags installed in the Plaintiffs and other members of the class vehicles are unreasonably dangerous, and whether General Motors withheld that information from the Plaintiffs, members of the class and NHTSA are the issues to be determined. The resolution of these issues will be applicable to each and every class member and will be dispositive of every class member's claims. However, it is the opinion of this Court that forcing thousands of individuals to file identical individual actions would burden the courts of this state (and every other state) unnecessarily if, and it is unlikely, those individuals discovered their legal rights and retained counsel. This Court finds that, given the presence of questions of law or fact common to the plaintiffs and members of the class, the requirement for the existence of common questions of fact *or* law is satisfied.

3. Typicality.

Section 2023(A)(3) requires that the proponent of the class action demonstrate that the claims or defenses of the representative parties are typical of the claims or defenses of the class. 12 Okla.Stat.Ann. § 2023(A). The measure of whether a plaintiff's claims are typical is whether the nature of plaintiff's claims, judged from both a factual and legal perspective, are such that in litigating his personal claims, he can reasonably be expected to advance the interest of

absent class members. *See Lobo Explorations Co. v. Amoco Productions*, 991 P.2d 1048, 1055 (Okla. 1999). "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Id.* (quoting *Alpern v. UtiliCorp United Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996)).

The plaintiffs have argued that their claims against General Motors arise out of the same course of conduct (i.e., installation of unreasonably dangerous air bag sensing and algorithm systems and withholding of information regarding the safety of these air bag systems), and are based on the same legal theories as those of the class (breach of UCC warranties, implied and express, and unjust enrichment). Both Cartwright and Ford own GM P-90 platform automobiles manufactured in Oklahoma City between 1997 and April 24, 1999, equipped with the allegedly defective air bag systems, as do all prospective members of the class. The central issues in this case are whether the subject air bags are unreasonably dangerous due to either their nature or an inherent design defect so as to be unfit for their intended use or are in breach of GM's written and implied warranties, and whether General Motors withheld knowledge of the dangerous nature of the air bag systems from consumers and NHTSA. The question of whether the subject air bag systems are dangerous due either to their nature or an inherent design defect is one common to all class members, as these identical air bag systems were installed in all automobiles covered by the class definition. Additionally, the question of whether General Motors withheld information regarding the dangerous air bag systems from the class members in general and from NHTSA

is one that is also common to the class. If Cartwright and Ford prevail on their claims, the class will benefit from the determination. Likewise, if General Motors prevails, the class will also be bound by that determination. This is precisely the type of situation envisioned by § 2023 wherein a class action effectively and efficiently resolves issues common to many with efficient utilization of judicial resources.

The common issues presented here are such that in litigating the liability issues, the representative plaintiffs may reasonably be expected to advance the interests of all class members toward a favorable determination with respect to each such issue. Therefore, this Court finds that the claims of the representative plaintiffs are typical of the claims of the class.

4. The Plaintiffs will Fairly and Adequately Protect the Interests of the Class.

The adequacy inquiry focuses on whether the representative parties will fairly and adequately protect the interests of the class. *Black Hawk Oil v. Exxon, supra.*, 969 P.2d 337. This requirement is met if (1) plaintiffs' attorneys are qualified, experienced and generally able to conduct the litigation and (2) plaintiffs' interests are not antagonistic to those of the class they seek to represent. *See. e.g., Prudential*, 148 F.3d at 312; *Lewis v. Curtis*, 671 F.2d 779, 788 (3rd Cir.), *cert. denied*, 459 U.S. 880 (1982).

It is evident that plaintiffs have retained counsel highly experienced in class action litigation to prosecute their claims. All counsel for plaintiffs have been appointed class

counsel in successful consumer litigation in numerous states, including the State of Oklahoma. Some of the counsel for the plaintiffs have previously practiced before this Court on several occasions regarding class issues. Therefore, this Court finds that the first prong of the adequacy inquiry has been satisfied.

Second, there is nothing in the record to suggest that either Cartwright or Ford have any interests antagonistic to the claims advanced on behalf of the class.

This Court believes the representative Plaintiffs will adequately represent the interests of the Class, and have no interests antagonistic to the Class they seek to represent; therefore, this Court finds that the adequacy requirement of § 2023(A) has been satisfied.

5. Predominance Requirements for a Class Action under Section 2023(B)(3) are Satisfied.

a. Common Issues Predominate Over Individual Issues

Plaintiffs seek certification of an "opt out" class with regard to the "damages" claims pursuant to § 2023(B)(3), which states that certification is appropriate when:

> The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient

adjudication of the controversy. The matters pertinent to the findings include:

(a) the interest of the members of the class in individually controlling the prosecution or defense of separate action,
(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,
(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and
(d) the difficulties likely to be encountered in the management of a class action.

Okla. Stat. Ann. Title 12 § 2023(B)(3) (1991)

This subsection requires that two basic findings be made: (1) that common questions of law or fact predominate, and (2) that a class action is superior to other forms available for fair and efficient adjudication. Okla.Stat.Ann. Tit. 12 § 2023 (1991); *Lobo Exploration Co. v. Amoco Productions*, 991 P.2d at 1052. Both findings simply call for a qualitative analysis of the case. *See Matton v. City of Norman*, 1981 OK 92, 633 P.2d 735, 739 (Predominance "is a qualitative rather than a quantitative matter").

Those members of the Class interested in pursuing their own actions have the right and ability to do so under a (B)(3)

certification. Thus, the inquiry becomes a pragmatic one that asks whether there are enough common questions to justify a common adjudication. *Copley*, 158 F.R.D. at 491. The Plaintiffs have demonstrated that both predominance and superiority are satisfied in the case at hand, and this Court concludes that this case should be certified pursuant to § 2023(B)(3).

b. Predominance of Common Questions of Law or Fact

Section 2023(B)(3) requires only that common questions of law *or* fact predominate. Further, federal courts uniformly hold that not every question of law or fact must be common to the class; it is sufficient that common questions predominate over individual ones. *See*, 7A Wright, Miller & Kane, *Federal Practice and Procedure*: *Civil 2d* § 1778 at 528 (1986).

"Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Lobo Exploration Co. v. Amoco Productions*, 991 P.2d 1048, 1055 (Okla. 1999). Common issues clearly predominate in this case. There is one core liability issue that predominates this case: Whether the GM design defect is present in all vehicles. *See, Samuel-Bassett v. Kia Motors America, Inc.*, 212 F.R.D. 271, 282 (E.D. Pa. 2002). Each class member possesses the same GM P-90 automobiles manufactured in Oklahoma between 1997 and April 24, 1999, containing the same airbag system with the same defects. All claims arise from the same

conduct of GM in continuing to allow these vehicles to operate on the roadways without fixing the defective airbag systems or informing the owners, lessors and NHTSA of the defects. All class members seek the same relief. No individual questions exist. Common questions of fact clearly predominate. This alone is sufficient to meet the requirements of § 2023(B)(3).

Defendant argues that the need to apply different states' laws destroys the predominance finding. The plaintiffs and the defendants have each presented an analysis of the choice of law issues. The Plaintiffs have also presented a number of decisions where the court, in similar cases, has found the predominance requirement met despite the choice of law problems. After reviewing these the Court concludes that the alleged choice of law problems identified by the Defendants do not bar certification for at least two reasons. First, GM's argument that fifty state's laws will apply overstates the choice of law issues.

> "There will never be 50 different substantive rules, or even fifteen or ten. States tend to copy their laws from each other, and many use identical or virtually identical rules. In practice, the court will seldom have to deal with more than three or four formulations . . .

L. Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. Rev. 547, 583 (1966). The Court believes that the creation of subclasses will make the issues manageable for purposes of adjudication. § 2023(C)(4), *O'Keefe v. Mercedes-Benz USA, L.L.C.*, 215 F.R.D. 266, 291 (E.D. Pa. 2003).

Second, and more important, when the Court makes its choice of law decision, the Court is mindful that the Oklahoma Supreme Court resolved this issue in *Ysbrand v. Daimler-Chrysler*, 81 P.3d 618 (Okla. 2003), where it held that a nationwide class of owners of minivans equipped with defective airbags could properly bring their UCC warranty claims, express and implied, in the Oklahoma courts.

c. A Class Action as the Superior Method for Adjudication

In assessing superiority, courts acknowledge that case management challenges may flow from a grant of class certification. However courts also recognize that the broad discretion vested in the trial court by § 2023 provide the framework and flexibility to meet such challenges. See Okla. Stat. Ann. Tit. 12 § 2023(C) (1991). The ability of the class action device to bring all claimants together for adjudication of their common issues in a single proceeding far outweighs the logistical demands of class treatment, particularly since the class mechanism "reduces the systemic burden" on the court system and litigants by reducing the time and costs which must otherwise be spent in replicating the same case many times over. *Copley*, at 473.

The named plaintiffs aver that General Motors owes the class members either appropriate compensation for the cost of retrofitting their vehicles with safe air bags, or to provide the class members with the difference in value of the vehicles they believed they were purchasing/leasing and the diminished value of the defective vehicles they actually received.

Appendix B

It has been argued by the plaintiffs that the estimated cost of retrofitting an automobile with the new algorithm is approximately $500 per vehicle. It is not conceivable that an individual plaintiff would bring suit, or even be able to find an attorney willing to handle a case with such a low potential recovery, on his/her own behalf. As such, it is clear that most individual claims are not sufficiently substantial to support individual litigation, a factor in support of plaintiffs' argument that a class action is superior to other means of adjudication.

The alternatives to a class action are either no recourse for hundreds of thousands of vehicle owners, or even in the unlikely event that they all become aware of their rights and could locate counsel, a multiplicity of scattered suits resulting in the inefficient administration of litigation.

The GM contends that administrative remedies are superior to Plaintiffs' claims. The premise of this argument is that these remedies preempt Plaintiffs' claims, an argument that the Court has rejected in denying defendant's motion to dismiss. In addition, GM's argues that NHTSA provides a remedy that is superior to a class action. Here, NHTSA has already closed its inquiry when GM provided the statistics GM provided. Thus, GM's argument fails for the same reason that the Oklahoma Supreme Court in *Ysbrand* rejected this argument under nearly identical circumstances.

> "There is no administrative method of adjudication available to Plaintiffs. The NHTSA has declined to investigate further. An alternate method for adjudication must be *available* in order for it to be superior" [under 2023(B)(3)].

Ysbrand at 628.

Appendix B

CONCLUSION

Because this Court finds that class certification will provide a just, speedy, and inexpensive determination of this case, and because Plaintiffs' request complies with Section 2023 of Title 12 of the Oklahoma Pleading Code, the Plaintiffs' Motion for Class Certification is GRANTED.

> The Court hereby CERTIFIES the following class against Defendant General Motors:
>
> All current owners and lessees of 1997-1999 General Motors P-90 platform automobiles manufactured in Oklahoma, encompassing all persons or entities resident in the United States who own or lease Chevrolet Malibu and Oldsmobile Cutlass models manufactured before April 24, 1999. Excluded from this class is any person, firm, corporation, trust or other entity related to or affiliated with defendant General Motors or any person who has or had an action for personal injury or death against General Motors as a result of an inadvertent airbag deployment in such vehicle.

The Court, however, declines at this time to decide the necessity or scope of any Rule 2023(c)(4) subclasses.

The Court hereby appoints the following law firms as Class Counsel for the plaintiffs and the class: Michael Burrage of the Burrage Law Firm; Henry A. Meyer, III, John B. Norman and Jonathan Chris Horton of Norman & Edem,

PLLC; Sean Burrage of Taylor, Burrage, Foster, Mallett, Downs & Ramsey, P.C.; Steve Garner and Jeff Bauer of The Strong Law Firm, P.C., and Edward D. Robertson, Jr. and Mary D. Winter of Bartimus, Frickleton, Robertson & Obetz, P.C.

The Court notes that this certification, like all class certifications, is conditional and may be reconsidered at a later date, if necessary.

The Court, having fully considered the positions of all the parties, further finds that any outstanding objections to class certification are overruled.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

ENTERED this 18 day of February, 2004.

s/ ILLEGIBLE

APPENDIX C — ORDER OF THE SUPREME COURT OF THE STATE OF OKLAHOMA DENYING PETITION FOR CERTIORARI DATED AND FILED APRIL 4, 2005

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Monday, April 4, 2005

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

* * *

100,474 Delmas Ford, et al., v. The General Motors Corporation, a Deleware Corporation
Petition for certiorari is denied.
CONCUR: Watt, C.J., Lavender, Opala, Edmondson, Taylor, Colbert, JJ.
DISSENT: Winchester, V.C.J., Hargrave, J.
NOT PARTICIPATING: Kauger, J.

* * * *

s/ Joseph M. Watt
CHIEF JUSTICE

APPENDIX D — CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE I, SECTION 8
(Commerce Clause)

Congress shall have the power . . . To regulate Commerce with foreign Nations, and among these several States, and with Indian Tribes.

ARTICLE IV, SECTION 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribed the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

FOURTEENTH AMENDMENT, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
SEP - 1 2005
OFFICE OF THE CLERK

NO. 05-39

IN THE

Supreme Court of the United States

GENERAL MOTORS CORPORATION,
Petitioner,

v.

DELMAS FORD, SHIRLEY CARTWRIGHT, BERT CROSSLAND, MARGARET CROSSLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals of Oklahoma, Division III

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September 2005

QUESTION PRESENTED

1. Does this Court have jurisdiction under 28 U.S.C. § 1257 to review the judgment of the Oklahoma Court of Civil Appeals, Division III, affirming the trial court's interlocutory class certification order?

2. Does the Due Process Clause or the Commerce Clause forbid a court from applying the law of one state to the claims of a nationwide class of plaintiffs, where that state has a significant relationship to those claims?

3. Does a class action notice violate due process solely because it does not identify which state's law will apply?

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INTRODUCTION

Petitioner General Motors Corporation ("GM") asks this Court to review an unreported decision of the Oklahoma Court of Civil Appeals, Division III, affirming the trial court's decision to certify a nationwide products liability class action. The decision below closely follows the Oklahoma Supreme Court's decision in *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618 (Okla. 2003), from which review was sought and denied just last year, 124 S. Ct. 2907 (2004).

GM's petition, which resurrects the petition in *Ysbrand* nearly verbatim, should be denied for the same reasons certiorari was denied in that case. Most fundamentally, review should be denied because this Court lacks jurisdiction over non-final orders from the state courts. The Court has previously concluded that orders granting class certification are interlocutory, and the petition fails to present any compelling policy reason to depart from that conclusion. But even if this Court did have jurisdiction, certiorari would be inappropriate because no court has ever adopted the Due Process or Commerce Clause analysis that GM urges here. On the contrary, when confronted with the issue presented—whether the Constitution prevents a court from applying the law of one state to the claims of a nationwide class of plaintiffs, when that state has a significant relationship to those claims—courts across the nation have uniformly come to the same conclusion as the Oklahoma courts. Moreover, the petition's view that due process requires a class notice to identify the state whose law will be applied has never been addressed, much less adopted, by any appellate court.

Additionally, three features of this case make it even less certworthy than *Ysbrand*. First, GM failed to present to the

Oklahoma Supreme Court the principal federal questions that it now asks this Court to review. Second, as GM conceded below, appellate review of the issues presented here would be premature in light of the trial court's decision to defer the ultimate determination of what state's law will apply to plaintiffs' claims. Third, as the petition acknowledges, the recent enactment of the Class Action Fairness Act of 2005 significantly diminishes the importance of the issues presented in the petition.

STATEMENT

Automobile manufacturers have long known of the dangers caused by inadvertent deployment of airbags. "Because air bags are designed to inflate almost instantly upon impact," in some circumstances, "the force of the inflation can injure, even kill." *Public Citizen v. Nat'l Highway Traffic Safety Admin.*, 374 F.3d 1251, 1254 (D.C. Cir. 2004). Between 1997 and 1999, GM manufactured over 420,000 Chevrolet Malibu and Oldsmobile Cutlass automobiles at its facility in Oklahoma City. In 1999, as evidence began to accumulate that these two models, known collectively as GM P-90 automobiles, contained defective airbag systems that tended to deploy inadvertently, the National Highway Traffic Safety Administration (NHTSA) opened a safety investigation into the defects. NHTSA, however, ultimately closed its investigation without issuing a recall or requiring GM to correct the problem. Pet. App. 8a.

Respondents are owners and lessees of GM P-90 automobiles who sued GM in Oklahoma, alleging that the airbag system in their automobiles was defective and asserting claims under the Uniform Commercial Code for breach of express warranty, breach of the implied warranty of merchantability, and breach of the implied warranty of fitness

for a particular purpose, as well as claims under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310, and for unjust enrichment. Pet. App. 2a.

The Oklahoma trial court certified a class of all current owners and lessees of GM P-90 platform automobiles manufactured in Oklahoma between 1997 and 1999. Pet. App. 30a. The trial court considered the parties' arguments concerning choice of law and rejected GM's argument that the need to apply different states' laws precluded a finding that common issues predominate. Pet. App. 28a. Instead, the court relied on the Oklahoma Supreme Court's decision in *Ysbrand*, which held that Oklahoma's choice-of-law rules permit the application of the law of a single state to the U.C.C. warranty claims of a nationwide class, where that state has a significant relationship with the claims. The court, however, deferred the ultimate choice-of-law determination to the merits stage of the proceedings. *Id.*

GM immediately appealed the certification order, which a three-judge panel of the Oklahoma Court of Civil Appeals, Division III, unanimously affirmed in an unpublished opinion.[1] With respect to GM's choice-of-law arguments, the appellate court concluded that the Oklahoma Supreme Court had already "considered these issues in *Ysbrand*." Pet. App. 4a. Because *Ysbrand* held that Oklahoma's choice-of-law doctrine allows application of the law of the manufacturer's state to UCC warranty claims without violating due process, the appellate court concluded, the trial court did not abuse its discretion in

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[1]There are four divisions of the Oklahoma Court of Civil Appeals. Unless it is published, an opinion of any one of the divisions has "no precedential effect." *Skinner v. John Deere Ins. Co.*, 998 P.2d 1219, 1224 (Okla. 2000).

deciding to certify the class. Pet. App. 7a. GM then filed a petition for certiorari with the Oklahoma Supreme Court, which was denied. This petition followed.

REASONS FOR DENYING THE WRIT

I. This Court Lacks Jurisdiction Because the Judgment Below Is Not Final.

Congress has limited this Court's review of state court decisions to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision [on a federal question] could be had." 28 U.S.C. § 1257(a). Recognizing the inherently interlocutory nature of the decision below, petitioner attempts to invoke the fourth exception to section 1257's finality requirement. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). That narrow exception has two requirements. First, the state court judgment must represent the final word within the state court system on a federal issue, with further proceedings pending in which the party seeking review might prevail on the merits on non-federal grounds, and where reversal of the state court on the federal issue would preclude any further litigation on the relevant claims. *Id.* Second, "a refusal immediately to review the state-court decision" must present a risk of "seriously erod[ing] federal policy." *Id.* Neither requirement is met here.

First, the federal issues on which review is sought have not been finally decided by the courts of Oklahoma. As explained below (at 7-9), the Oklahoma Supreme Court never had an opportunity to decide the principal questions presented in the petition. Moreover, GM conceded in its petition to the Oklahoma Supreme Court that review of the federal constitutional questions that it now asks this Court to decide

would be premature. *See* GM Pet. in Okla. S. Ct. 3 n.1 (arguing that, without a final determination of what state's law will apply, "review of whether a trial court's certification of a nationwide class comports with the due process, full faith and credit, and commerce clauses is virtually impossible."). In short, even as to the federal questions presented in the petition, the decision below is "avowedly interlocutory." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997).

Second, in light of *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), petitioner cannot show that a refusal to review the decision below immediately risks a serious erosion of federal policy. *Coopers & Lybrand* held that "[a]n order passing on a request for class certification" is not a final order, and hence is not appealable as a collateral order under 28 U.S.C. § 1291. *Id.* at 469. The Court found no reason to allow immediate review for three reasons, each of which is equally applicable here: (1) that the "order is subject to revision" by the trial court, (2) that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiffs' cause of action,'" and (3) that the order "is subject to effective review after final judgment." *Id.* (citations omitted).

Of particular relevance to the "erosion of federal policy" factor, *Coopers & Lybrand* dismissed the parties' competing policy arguments about the consequences of class action litigation as immaterial to the question of finality. *Id.* at 470. ("Such policy arguments, though proper for legislative consideration, are irrelevant to the issue we must decide."). The Court also rejected the notion that, absent appellate rules to the contrary, appeals in class actions should be governed by rules different from ordinary litigation. *Id.* ("The appealability of any order entered in a class action is determined by the same

standards that govern appealability in other types of litigation."). Because petitioner can make no convincing claim of erosion of federal policy that is not common to virtually all orders granting class certification in large class actions, the fourth *Cox* exception does not apply. *Johnson v. California*, 541 U.S. 428, 430 (2004); *Florida v. Thomas*, 532 U.S. 774, 780 (2001). "A contrary conclusion would permit the fourth exception to swallow the rule." *Flynt v. Ohio*, 451 U.S. 619, 622 (1981) (per curiam).

Petitioner attempts to limit the reach of *Coopers & Lybrand* on the ground that the particular order at issue there was an order denying rather than granting certification. Pet. 27 n.5. But *Coopers & Lybrand* specifically rejected any attempt to draw a distinction, for finality purposes, between orders granting and denying certification. On the contrary, the Court made clear that "orders *granting* class certification are interlocutory." 437 U.S. at 476 (emphasis added). The Court recognized that class certification may often be of "critical importance" to defendants, and took note of the risk that "[c]ertification of a large class" may pressure defendants to settle—the same policy concerns on which GM relies here. *Id.* Nevertheless, the Court explained that "[w]hatever similarities or differences there are between plaintiffs and defendants in this context involve questions of policy for Congress." *Id.* at 476 & n.28 (citing *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181-82 (1955)). Notably, in 1998, Congress exercised its policy judgment and allowed limited discretionary appeals within the *federal* courts from "order[s] granting or denying class certification." Fed. R. Civ. P. 23(f), but has not seen fit to modify section 1257 to permit review of interlocutory *state* court certification orders by this Court. And even under Rule 23(f), the federal courts of appeals have "unfettered discretion whether to permit the appeal," and are instructed, on the basis

of a Federal Judicial Center study, that "many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings." Fed. R. Civ. P. 23(f), Advisory Committee Notes.

That this case comes from a state rather than a federal court only reinforces the conclusion that the Court lacks jurisdiction. Section 1257's finality requirement serves not only the same interest in efficient judicial administration that underlies section 1291, but also "serves an important interest of comity." *Adams v. Robertson*, 520 U.S. 83, 90 (1997). For this reason, section 1257 establishes a particularly "firm" rule and "'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Jefferson*, 522 U.S. at 486 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)); *see also Cox Broad. Corp.*, 420 U.S. at 503 (1975) (Rehnquist, J., dissenting) ("[T]he underlying concerns [in §§ 1257 and 1291] are different, and that difference counsels a *more restrictive* approach when § 1257 finality is at issue.") (emphasis added).

II. Petitioner Did Not Present to the Oklahoma Supreme Court the Principal Federal Issues On Which It Seeks Review.

The petition's central argument is that the Due Process Clause requires an "individualized" choice-of-law analysis, and that the decision below runs afoul of such a requirement. Pet. 5-17. In its brief to the Oklahoma Court of Civil Appeals, GM argued that the trial court's choice-of-law analysis violated due process, *see* GM Apl. Br. 19-23, and the court, relying on *Ysbrand*, rejected that argument. *See* Pet. 6a (citing *Ysbrand*, 81 P.3d at 625-626; *Phillips Petroleum Co. v. Shutts*, 472 U.S.

797, 818 (1985)). GM, however, completely omitted this issue from its petition to the Oklahoma Supreme Court. Indeed, GM fell short of making even the sort of "passing invocations of 'due process'" that this Court has found insufficient to meet the "minimal requirement that it must be clear that a federal claim was presented." *Adams*, 520 U.S. at 89 n.3. Similarly, the petition argues that the decision below runs afoul of constitutional limits on extraterritorial regulation, Pet. 17-20, but GM did not raise that issue in its petition to the Oklahoma Supreme Court either.[2]

"[W]hen the highest state court fails or refuses to pass expressly upon a federal question, the party invoking the Supreme Court's jurisdiction has the high burden of showing that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for want of proper presentation." Stern, Gressman, et al., *Supreme Court Practice* 175 (8th ed. 2002); *see Street v. New York*, 394 U.S. 576, 582 (1969). Because "it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider," this "rule affords state courts an opportunity to consider" the questions presented in the first instance. *Adams*, 520 U.S. at 90 (internal citation omitted); *id.* (state's highest court "has an undeniable interest in having the opportunity to determine in the first instance whether its existing rules governing class-action[s] satisfy the requirements of due process"). The Oklahoma Supreme Court did not have that opportunity and, accordingly, this Court should deny review.

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[2]The *only* federal constitutional issue that GM presented to the state's highest court was its argument that the certification order violated due process because the class notice would be constitutionally inadequate. *See* GM Pet. to Okla. S. Ct. 8-10; *see also* Pet. 20-22 (making same argument).

That conclusion follows regardless of whether the Court treats the requirement as prudential or jurisdictional. *Id.*; *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992).[3]

III. No Court Has Adopted the Due Process Analysis Urged by Petitioner.

Petitioner asserts that the decision below conflicts with decisions that "require, in the context of a putative nationwide class action, that choice-of-law principles be applied to each potential plaintiff, not to the litigation as a whole with the goal of certifying a class." Pet. 6. Even if the Court were to assume that it has jurisdiction and were to overlook petitioner's waiver of this issue, review would still be unwarranted because there is no such conflict.

In assessing the constitutionality of choice-of-law decisions in class actions, the Oklahoma courts faithfully apply this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985): "[F]or a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 818 (quoting *Allstate Ins. Co. v.*

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[3]The petition should also be denied because it violates this Court's Rule 14.1(g)(i), which requires the petitioner to specify when and where the federal questions sought to be reviewed were raised in the state courts, including "pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears." The petition states only that GM raised "federal-law issues" in its petition to the Oklahoma Supreme Court, without elaboration. Pet. 4. "This general citation fails to comply with our requirement that petitioners provide us with '*specific* reference to the places in the record where the matter appears.'" *Adams*, 520 U.S. at 89 n.3 (emphasis in original).

Hague, 449 U.S. 302, 312-313 (1981) (plurality opinion)); *see* Pet. App. 6a.

None of the cases that GM cites holds that due process forbids a court from considering whether a single state's law may apply to claims of a class of plaintiffs who, as here, have identical significant contacts with that state. Nor do any of the cited cases hold that *Shutts* prohibits a choice-of-law analysis that accounts for the class-action nature of claims as long as significant contacts otherwise exist. Instead, the cases cited in the petition uniformly identify a general constitutional requirement—which no one disputes—that the claims of all individual members of the plaintiff class have significant contact with the state.[4] To the extent they speak of "an individualized choice-of-law analysis" at all, Pet. 10, courts require nothing more than the standard significant contacts analysis employed by the Oklahoma appellate courts, both here and in *Ysbrand*. *See* Pet. App. 5a-6a (choice-of-law analysis must be consistent with the "constitutional imperative" that the state whose law will be applied to the plaintiffs' claims has "['a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair'") (quoting *Ysbrand*, 81 P.3d at 625-26 (quoting *Shutts*, 472 U.S. at 818)).

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[4] *See, e.g.*, *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 n.6 (11th Cir. 1987) (citing *Shutts* for proposition that "the law of Georgia could be applied consistent with due process only if the particular transaction had some significant relation to Georgia"); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 n.90 (D.C. Cir. 1986) (interpreting *Shutts* to require that the state whose law was applied "had a significant relationship to each class member's claim"); *Clarke v. TAP Pharm. Prods., Inc.*, 798 N.E.2d 123, 129 (Ill. App. Ct. 2003) (finding a state's law can be applied to a class action consistent with *Shutts* when the state "has significant contact or aggregation of contacts to the claims asserted by each member of the plaintiff class").

Several of the cases that GM cites examine only a lower court's failure to conduct *any* choice-of-law analysis.[5] Not surprisingly, therefore, these cases find only that the lower courts should have conducted *some* analysis that—consistent with *Shutts*—did not *assume* that the forum state's law would apply to a nationwide class.[6] Consistent with these holdings, the Oklahoma appellate court *did* conduct a preliminary analysis of the choice-of-law issue in accordance with *Ysbrand*. Moreover, in none of cases cited in the petition did the courts reject certification in the face of a developed argument that a single state had significant contact with all the claims. *See, e.g.*, *Walsh*, 807 F.2d at 1016 (noting that the party seeking certification of nationwide class action treated choice-of-law decision as "academic").

The other cases GM cites do not rest on due process principles at all, but are instead determinations based on various

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[5] *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626 (3d Cir. 1996) (holding that mere existence of settlement does not show that Rule 23(a) commonality requirement is met), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Walsh*, 807 F.2d at 1016 (noting that the district court explicitly declined to consider application of multiple states' law); *Debbs v. Chrysler Corp.*, 810 A.2d 137, 159 (Pa. Super. Ct. 2002) ("The record fails to reflect an analysis of the choice-of-law issue.").

[6] *See Walsh*, 807 F.2d at 1016 ("Appellees see the 'which law' matter as academic. . . . A court cannot accept such an assertion 'on faith.'"); *Debbs*, 810 A.2d at 159 ("[A] trial court can not sidestep choice-of-law issues by declaring that the class action would be governed by [the forum state's] law.").

states' choice-of-law doctrine.[7] These cases differ from the decision below only in that those states' choice-of-law doctrines differ—either in theory or in application—from Oklahoma's. None of these courts found that *Shutts* mandated deviating from the dictates of state choice-of-law doctrine.

When applying *Shutts* to the actual issue presented in this case—whether due process permits a state's choice-of-law doctrine to apply to a nationwide class of plaintiffs the law of a single state with a significant relationship to the claims—courts across the nation, *without exception*, come to the same conclusion as the Oklahoma courts. In short, when the court does not merely assume that the forum state's substantive law applies to the claims of all the plaintiffs in a nationwide class action but instead determines that one state has significant contact with the claims of all plaintiffs, courts have always

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[7] *See Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1187 (9th Cir. 2001) (examining whether Colorado law would apply to a plaintiff class under California's government-interest doctrine after noting plaintiffs' concession that the application of California law would violate *Shutts*); *Kirkpatrick*, 827 F.2d at 725 & n.6 (determining that Georgia's *lex loci delicti* doctrine would require application of multiple states' law for class action with nationwide class); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 696-98 (Tex. 2002) (refusing to apply manufacturer's state's law to nationwide plaintiff class under Texas choice-of-law doctrine with no reference to due process); *Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349, 355-59 (Tex. App. 2003) (refusing to apply manufacturer's state's law to claims by plaintiff nationwide class under *Schein* and other state-law precedents without further reference to opening observation that due process limits choice-of-law). The subsequent decision in *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657 (Tex. 2004), which is not cited in the petition, likewise straightforwardly applies Texas choice-of-law doctrine without further reference to the opening observation that choice-of-law must comply with due process. *See id.* at 680-81.

found the state's choice-of-law decision constitutionally valid.[8]

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[8] *See, e.g., In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, 201 F.R.D. 456, 461 n.1 (D. Minn. 2001) (finding no due process violation in applying the law of the state where defendant had its headquarters to a nationwide class action); *Simon v. Phillip Morris, Inc.*, 124 F. Supp. 2d 46, 69-70 (E.D.N.Y. 2000) ("[Defendants] assert that, even assuming that defendants did substantial business in the forum state and conducted a national fraud from the forum state, its courts may not apply forum law to individual claims of non-forum residents whose injuries were suffered in their home states. *Shutts*, however, has not been read so narrowly."); *In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 686-87 (N.D. Cal. 1986) ("Evidently, defendants believe that the *Shutts* test can only be satisfied by a court's making specific findings regarding the [state's] contacts to each class member's claims, name-by-name. The Court finds no basis for interpreting *Shutts* in such a way. The *Shutts* opinion merely requires a showing that there are sufficient contacts between the forum state and each individual class member's claims to create forum interests in the litigation such that application of forum law will not be arbitrary or unfair. When a court finds that this requirement can be satisfied by simply considering contacts that apply generally to every class member's claims, the court need not articulate how the contacts apply in each class member's case."); *In re LILCO Sec. Litig.*, 111 F.R.D. 663, 670 (E.D.N.Y. 1986) ("Without doubt, *Shutts* does not require us to apply the law of each state in which the plaintiffs reside nor does it prohibit the application of one state's law to all plaintiffs, regardless of residence."); *In re Activision Sec. Litig.*, 1985 WL 5827 at *1 (N.D. Cal. Dec. 2, 1985) ("[D]efendants contend that under *Shutts* 'blanket' application of [a state's] law to the common law claims of all plaintiffs would be unconstitutional . . . . Defendants read *Shutts* too broadly and confuse constitutional limitations upon application of a state's law with the application of state choice-of-law rules."); *Washington Mut. Bank, FA v. Superior Court*, 15 P.3d 1071, 1081 (Cal. 2002) (holding state choice-of-law doctrine could constitutionally assign burden to defendant to demonstrate appropriateness of another state's law as long as significant contacts exist); *Macomber v. Travelers Prop. & Cas.*, 2004 WL 1559183 at *9 (Conn. Super. Ct. May 26, 2004) (holding that claims of entire plaintiff class had constitutionally sufficient contact with state when defendant's headquarters were located in the state).

At bottom, petitioners' complaint is with the Oklahoma courts' holding that their own choice-of-law jurisprudence allows application of the law of a single state to U.C.C. warranty claims. But this is a decision on a matter of state law that our federal system leaves to the courts of Oklahoma. This Court has long recognized the right of states to adopt distinctive choice-of-law doctrines that must be respected by the federal courts, *see Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), and it has specifically refused to reconsider this deference even when pressed to do so by the circuit courts. *See Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (per curiam).

Finally, the Court should deny review because the importance of the question presented is significantly diminished by the enactment of the Class Action Fairness Act of 2005 ("CAFA"), which grants the federal courts jurisdiction over most class actions in which class members reside outside the forum state. *See* Pub. L. No. 109-2, § 4(a), 119 Stat 4, 9-12 (to be codified at 28 U.S.C. § 1332(d)) (providing federal courts with original jurisdiction in class actions seeking more than $5 million in damages when at least one class member has diverse citizenship from at least one defendant). GM itself acknowledges that CAFA's passage greatly reduces the significance of this case. *See* Pet. 5 n.3 (suggesting that review by this Court would affect only those cases pending in state court before CAFA's enactment).

IV. No Court Has Rejected a State Choice-of-Law Ruling Supported by Significant Contacts on the Ground That It Violates Constitutional Limits on Extraterritorial Regulation.

GM's second basis for seeking certiorari is even further

afield than the first. To make its argument, GM must liken the application of Oklahoma's significant contacts analysis to instances in which this Court has found that a state violates the Commerce Clause or Due Process Clause by engaging in wholly extraterritorial regulation, *i.e.*, regulation having *no* contact with the regulating state. *See* Pet. 17-20. But GM is unable to identify a single decision that has rejected a choice-of-law determination supported by a state's significant contact with the claim on the basis of extraterritorial regulation. On the contrary, every court to address this interplay of choice-of-law doctrine and the constitutional limits on extraterritorial jurisdiction has held that no constitutional violation is possible once a state's law is judged to have a connection to the claims at hand.[9]

GM argues that the application of a single state's law in this nationwide class action fails to honor the choice of substantive legal protections made by the class members' states of residency. Pet. 17. But such an outcome is inevitable in any choice-of-law decision where multiple states arguably have a

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[9] *See, e.g., Gravquick A/S v. Trimble Navigation Int'l Ltd.*, 323 F.3d 1219, 1224 (9th Cir. 2003) (finding California statute "does not regulate commerce entirely outside of California" because "[i]t applies only to contracts that have sufficient connections with California to support a California choice of law"); *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 825 (3d Cir. 1994) ("In traditional contract litigation, courts must apply some state's law to interpret the contract. While a contract which covers multiple states may raise a difficult choice-of-law question, once that question is resolved there is nothing untoward about applying one state's law to the entire contract, even if it requires applying that state's law to activities outside the state."); *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 614 A.2d 124, 147 (N.J. 1992) (equating constitutional restrictions placed on choice-of-law determinations by the prohibition of extraterritorial regulation and due process limitations of *Allstate*).

connection to the claims. Thus, GM's position would seemingly render unconstitutional *any* choice between these states' law. This Court has made clear, however, that multiple choice-of-law outcomes in a given situation may satisfy the Constitution. *See Shutts*, 472 U.S. at 823 ("[I]n many situations a state court may be free to apply one of several choices of law."); *Allstate*, 449 U.S. at 307 (plurality opinion) (noting "the recognition, long accepted by this Court, that a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction").

Even assuming that GM's position were correct in theory, the application of the prohibition on extraterritorial regulation to this case—like the due process claim under *Shutts*—founders on the Oklahoma courts' requirement that only the law of a state with significant contacts to the claims of all class members may be applied. As the very standard cited by GM indicates, the Commerce Clause's ban on extraterritorial regulation is implicated only when a state's law has the "undeniable effect of controlling commercial activity occurring *wholly outside* the boundary of the state." Pet. 17-18 (emphasis added) (quoting *Healy v. Beer Institute*, 491 U.S. 324, 337 (1989)) (internal quotation marks omitted). But here, the relevant commercial activity occurred within both GM's home state and the forum state, where the cars were manufactured. When a state regulates activity occurring within that state, this Court has sustained such regulation even if it affects economic activity in other states, unless it "impose[s] burdens on interstate trade that are 'clearly excessive in relation to the putative local benefits.'" *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 125 S. Ct. 2419, 2424 (2005) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). GM makes no claim, nor could it, that the state in which a manufacturer

conducts business or manufactures its products has a constitutionally insufficient interest in ensuring the safety of consumers affected by business activities in the state.

Similarly, this Court's punitive damages cases have held that the Due Process Clause invalidates state law as unconstitutional extraterritorial regulation only when a state imposes penalties "for conduct that was lawful where it occurred and that had *no impact* on [the regulating state] or its residents." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 (1996) (emphasis added); *see also State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) (noting that a State cannot impose penalties "to punish a defendant for unlawful acts committed *outside* of the State's jurisdiction") (emphasis added). Again, because the Oklahoma courts require, consistent with due process, that the state whose law will be applied have significant contact with the plaintiffs claims', there is no danger that they will run afoul of that principle. Indeed, this Court has indicated that a choice-of-law determination that complies with *Shutts* does not, by definition, involve an unconstitutional extraterritorial application of law. *See State Farm*, 538 U.S. at 421-22; *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494-95 (2003).

V. No Court Has Held That a Class Notice Must Identify Which State's Law Will Apply.

Finally, GM raises a novel argument that was not raised in the *Ysbrand* petition—that due process requires a class notice to identify which state's law will be applied. GM, however, is unable to cite even one decision that has adopted its argument. In fact, the only case GM cites in which a court found notice to be constitutionally lacking involved the failure to provide details of a proposed partial *settlement* of a class action. *See In*

re Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1105 (5th Cir. 1977). Nor does it appear that any appellate court in this country has addressed the issue of whether the state whose law will be applied must be identified in a certification notice.

The absence of any conflict on this point—indeed, the absence of any decision on point—is reason enough to deny review. But even if the issue were otherwise worthy of this Court's attention, certiorari is also unwarranted because GM's position is untenable on the merits. To be sure, due process requires class members to be informed of the pending suit and to be afforded the right to exclude themselves from the class. *See Shutts*, 472 U.S. at 812. To make these requirements effective, class members must receive notices that give certain information about the suit and their rights. *See, e.g.*, Fed. R. Civ. P. 23(c)(2)(B) (detailing information to be contained in notices sent out for class actions in federal courts). This Court, however, has stressed that when notice is constitutionally required, the Due Process Clause does not mandate rigid, inflexible standards. "It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Due process does not require that class members be provided a treatise on the law and claims at issue. As the standard quoted in the petition states, the touchstone of constitutionally adequate notice is providing information that "a reasonable person would consider to be material" in deciding whether to participate in the suit. Pet. 21 (quoting *Nissan*, 552 F.2d at 1105). "[A]n overly detailed notice would not only be unduly expensive, but would also confuse class members and impermissibly encumber their rights to benefit from the action." *Id.* at 1104.

GM's argument, if taken seriously, would cast doubt on this Court's recently approved changes to Rule 23, as illustrated by the model notices prepared by the Federal Judicial Center at the request of the Advisory Commitee of the Federal Rules of Civil Procedure. The newly-approved rule demands that class certification notices contain "concise[] and clear[]" statements "in plain, easily understood language." Fed. R. Civ. P. 23(c)(2)(B). Not one of the notices prepared by the Federal Judicial Center as exemplars of this type of notice contains information about the jurisdiction whose law will be applied—or, in fact, any detailed information about the legal particulars of the claim. *See e.g.*, Federal Judicial Center, *"Illustrative" Forms of Class Action Notices: Employment Discrimination Class Action Certification: Full Notice* 3-4, at http://www.fjc.gov/public/pdf.nsf/lookup/ClaAct11.pdf/$file/ClaAct11.pdf (last visited August 9, 2005) (noting only that claim involves whether employer "discriminated against female account executives based on their gender, by making it harder for them to advance in their careers" without providing any specifics on the exact legal provisions that the employer is accused of violating). In other words, petitioner contends that the Constitution requires in *every* instance what these model notices do not provide in *any* instance. To state this position is to refute it.

CONCLUSION

The petition for writ of certiorari should be denied.

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September 2005